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Supreme Court, U.S.
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No. _____

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In the Supreme Court of the United States

STEPHEN E. THOMPSON, AS ADMINISTRATOR FOR ESTATE OF CHANEL ANDRADE, et al.,
Petitioners,

v.

PHILLIP J. CHOJNACKI, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How is the 28 U.S.C. § 455 recusal standard applied to a trial judge who will act as a trier of fact on key, disputed issues which he has already decided in a prior case to which the Petitioners were not parties?

2. Does this Court's harm analysis announced in *Liljeberg v. Health Services Acquisition Corporation* apply broadly to all recusal errors or merely to those raised in Federal Rule of Civil Procedure 60(b)(6) motions?

3. Has an extreme departure from the accepted and usual course of judicial proceedings occurred where a judge denies a Section 455 motion to recuse despite: describing a party's evidence as "bullcrap"; characterizing one of its witnesses as a "crazy, murdering, son of a bitch"; admitting that he "never read" a party's evidence prior to announcing his intent to grant the opposing party's motion for summary judgment; congratulating and complimenting a party's attorney for conducting a cross-examination which reduced the opposing party's witness to tears; referring to a party's religious beliefs as "fanaticism," and to their spiritual leader as a "false prophet" who ignored the "Golden Rule"; engaging, prior to making findings of fact and conclusions of law, in *ex parte* communications with a reporter about the merits of a party's case; and, condoning multiple instances of "after-hours socializing," complete with complimentary meals and alcoholic beverages, between his marshals and one party's attorneys during the course of trial?

LIST OF PARTIES

The following persons have an interest in the outcome of this case:

A. PETITIONERS:

The following estate claims of Petitioners are brought by Administrator Stephen Thompson: Estate of Chanel Andrade, Crystal Jewel Barrios, Estate of Dayland Lord Little, Estate of Kara Brittani (Pages) Little, Estate of Abigail Martinez, Estate of Audrey Martinez, Estate of Joseph Martinez, Estate of Melissa Morrison, Estate of Mayanah Schneider, Estate of Aisha Gyarfas Summers, Estate of Startle Summers, Estate of Hollywood Sylvia, Estate of Rachel Ester Sylvia.

Other Petitioners consist of: Daniel Martinez, Sr., Thomas Barrios, Misty Dawn Ferguson, and Stanley Sylvia.

The remaining parties to the case below are not represented in this Petition.

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The Fifth Circuit Court of Appeals' July 14, 2003 opinion denying Petitioners' appeal in this case is reported at 338 F.3d 448 and reproduced in Appendix B. The Fifth Circuit's September 8, 2003 Order denying Petition for Rehearing En Banc is unreported and reproduced in Appendix A. The District Court's February 18, 1997 Order denying Petitioners' first Motion to Recuse is unreported and reproduced in Appendix D. The District Court's September 27, 2000 Amended Findings of Fact and Conclusions of Law and Order denying Petitioners' Second Motion to Recuse are reported at 116 F. Supp. 2d 778 and reproduced in Appendix C.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals' opinion was entered on July 14, 2003. Some of the Appellants (excluding Petitioners) filed a Petition for Rehearing *En Banc* on August 27, 2003. The Fifth Circuit denied the Motion on September 8, 2003. Therefore, this Petition was due on or before December 8, 2003. *See* SUP. CT. R. 13.3, 30.1. This Petition was mailed, via the United States Post Office, express mail, before this date. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN CASE

28 U.S.C. § 455(a):

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455 (b)(1):

> (b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

STATEMENT OF THE CASE

A. Nature of the Case

This Petition arises out of Federal District Judge Walter S. Smith Jr.'s refusal to recuse himself pursuant to 28 U. S. C. Section 455(a) and (b)(1), and the Fifth Circuit's affirmance of his refusal on appeal.

B. Statement of Facts

Petitioners in this case represent the estates of 14 deceased children killed during the Federal Bureau of Investigation's ("FBI") infamous April 1993 assault at the Branch Davidian's Mt. Carmel complex outside Waco, Texas. The remaining four Petitioners consist of three parents of children also killed during the assault and one fifteen-year-old girl who survived the assault, albeit badly burned and permanently disabled.

This senseless confrontation began on February 28, 1993 when over 100 agents from the Bureau of Alcohol, Tobacco and Firearms ("ATF"), equipped with flak jackets, semi-automatic weapons, concussion grenades and army helicopters, stormed the Mt. Carmel Church near Waco, Texas in order to serve a simple search warrant for Mt. Carmel and an arrest warrant for David Koresh, the Davidian's spiritual leader. The ATF agents chose this violent means to execute the warrants even though they could have arrested Koresh during any one of his many trips into Waco (and then peacefully served the search warrant), and despite knowing that the Davidians were expecting the assault, and thus stood in mortal terror. Some of the Davidians defended their home and sacred ground against this reckless

assault, which resulted in the death or injury of many Davidians, children, and federal agents.

The ATF subsequently withdrew and federal agents, under the direction of the FBI, maintained the siege of Mt. Carmel. Included among the tactics employed during this siege was the FBI's decision to: surround Mt. Carmel with military tanks and armored personnel carriers; throw light and sound grenades (called flashbangs) at any Davidian attempting to leave Mt. Carmel without FBI permission; crush the Davidian's automobiles and bicycles; execute the Davidian's pet dogs; and play loud sounds such as those of animals being slaughtered.

Another tactic employed by the FBI at Mt. Carmel included discussions, primarily with David Koresh and Steven Schneider, about the possibility of surrender. In fact, this tactic was initially successful as several Davidians and their children surrendered prior to the FBI's April 19 assault. Despite the promise of these discussions, however, the FBI ultimately became impatient with the pace of this peaceful solution and initiated its assault on Mt. Carmel.

During the assault of April 19, army tanks crushed potions of Mt. Carmel, while the same tanks and armored personnel carriers fired CS gas (a debilitating tear gas causing, among other things, involuntary closing of the eyes due to severe burning) canisters into its structure. Subsequently, a fire began and rapidly consumed the Mt. Carmel complex. As a result, Petitioners became trapped because the tanks had crushed staircases and blocked exits and because the CS gas handicapped their escape. Exacerbating this tragedy was the fact that the federal agents had no firefighting equipment on the scene and delayed the subsequent arrival of any equipment. Indeed, they refused offers of armored

firefighting vehicles from a private company. All totaled, at least 80 adults and children died.

C. Proceedings at the District Court and Fifth Circuit

Petitioners and many Branch Davidians subsequently filed claims arising from (1) the ATF's February 28, 1993 assault; (2) the subsequent siege by the ATF and the FBI; and (3) the FBI's April 19, 1993 assault. Petitioners sued the U.S. under the Federal Tort Claims Act (FTCA) and sued U.S. and state officials under the U.S. Constitution and federal statutes.[1]

On July 1, 1999, Judge Walter S. Smith, Jr. granted summary judgment for the United States on all of the above claims except for certain claims filed under the FTCA. Those surviving summary judgment included Petitioners' claims regarding the ATF/FBI's negligence in the initial raid on Mt. Carmel (*i.e.*, whether government agents shot indiscriminately and without provocation), and the FBI's negligence in relation to the fire of April 19 (*i.e.*, whether the government was negligent in starting and extinguishing the fire, and in blocking Davidians from exiting the burning building). Following trial, Judge Smith entered findings of fact, conclusions of law, and judgment on these remaining FTCA claims on September 20, 2000. In particular, Judge Smith found that Petitioners initiated and provoked the gun battle and intentionally started the fire that consumed Mt. Carmel.

Prior to conducting the bench trial in Petitioners' case, however, Judge Smith, in 1994, had presided over and made factual determinations in *United States v. Branch*, the criminal prosecution of 11 Branch Davidians for allegedly murdering

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); 42 U.S.C. §§ 1983 and 1985(3); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq.

and conspiring to murder federal agents between February 28 and April 19, 1993, and for alleged weapons violations. In sentencing the defendants that were convicted, Judge Smith announced his own factual determinations that the Branch Davidians "ambushed" ATF agents on February 28, ***started the April 19 fire***, and were, among other disreputable things, a "para-military" group seeking to "bring about a violent conflict with federal agents." These decisions were Judge Smith's; they were not contained in, or necessary to, the jury's verdict.

Subsequently, on April 2, 1996, Judge Smith issued a summary judgment ruling in *Risenhoover v. England*, a suit brought by ATF agents and their families against various media defendants and an ambulance company. Those plaintiffs alleged that the defendants alerted the Branch Davidians to the ATF's impending February 28 assault, thus causing death and injury to the ATF agents. In his summary judgment ruling, Judge Smith found, *inter alia*, that "gunfire from inside the Compound burst through the door and . . . windows" and that because of this "[t]he ATF agents returned fire." Judge Smith also concluded that Mt. Carmel "was consumed in a conflagration ***set by the Davidians***." Notably, the cause of the fire was not even an issue in *Risenhoover* which dealt solely with the events surrounding the February 28 assault.

Because of Judge Smith's factual predeterminations and biases formed in *Branch* and *Risenhoover*, coupled with his statutory role as fact-finder under the FTCA,[2] Petitioners filed these cases in the Southern District of Texas, where the

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[2] *See* 28 U.S.C. § 2402 (West Supp. 2003) ("[A]ny action against the United States under section 1346 shall be tried by the court without a jury. . . .")

planning for the ATF's assault had taken place. Over Petitioners' strenuous opposition (expressly based on the perceived inability of Judge Smith to sit an impartial trier of fact), the Southern District transferred these cases at the United States' request to the Western District, Waco Division, before Judge Smith. Petitioners promptly moved for his recusal, which he first denied on February 18, 1997. Prior to the court's entry of findings of fact, conclusions of law, and judgment on September 20, 2000, Petitioners filed a second motion to recuse on September 12, 2000. This second motion, in addition to re-urging those matters in their first motion, raised several additional bases for recusal. The court denied this motion as part of its Amended Findings of Fact and Conclusions of Law issued on September 28, 2000. Petitioners timely appealed this judgment and the orders denying these motions to the Fifth Circuit Court of Appeals on November 17, 2000. The Fifth Circuit subsequently denied Petitioners' appeal.

D. Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper in the Fifth Circuit Court of Appeals under 28 U.S.C Section 1291 as an appeal from a final judgment disposing of all parties' claims rendered in the United States District Court for the Western District of Texas. Jurisdiction is proper in this Court pursuant to 28 U.S.C. Section 1254(1), and Supreme Court Rules 10(a) and (c). That is, this Petition will present two substantial questions of law not previously decided by this Court. The first is whether this Court's decision in *Liteky v. United States* represents the applicable recusal standard where a judge acts as the trier of fact and has previously decided the same key fact issues in another case involving different parties. The second question is whether this Court's harm analysis announced in *Liljeberg v. Health Services Acquisition Corporation* applies to an

erroneous failure to recuse raised prior to judgment, rather than in a post-judgment motion. Finally, this Petition asks whether the Fifth Circuit's affirmance of the District Court's order denying recusal represents such a marked departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions of Law That Have Not Been, but Should Be, Decided by this Court

A. This Court Should Hold That Where a Trial Judge, Acting as Trier of Fact, Has Already Decided Key Fact Issues During a Prior Case Involving Certain Parties, He Is Disqualified from Subsequently Deciding the Same Issues Raised by Different Parties

1. *Liteky v. United States* Did Not Determine the Recusal Standard When the Trial Judge Is a Trier of Fact and Has Already Predetermined the Fact Issues

In no case, including its holding in *Liteky v. United States,* has this Court addressed the Section 455 recusal standard when a trial judge acts as the trier of fact, much less in a case where he also previously decided the same key fact issues in another case involving different parties. *See* 510 U.S. 540 (1994). Federal courts have no guidance as to how to apply 28 U.S.C. §§ 455(a) and (b)(1) and *Liteky* when the judge is not merely presiding over the subsequent case, but is also the juror. This Court should hold that, in such cases, the judge's recusal is required. A brief discussion of this decision is instructive.

In *Liteky*, the defendant complained that the trial judge should be recused from *presiding* over a *jury trial* because of statements and rulings he made in a prior *unrelated* case, involving the *same* defendant. *See Liteky*, 510 U.S. at 542. The *Liteky* judge was not the trier of fact, as Judge Smith was, and the buffer of a jury protected Liteky from the judge's predispositions. *See id.* at 543. There was no claim that the *Liteky* judge had predecided the issues in *Liteky*, nor could there have been because the facts of the *Liteky* case had not yet occurred at the time of the prior case. *Id.* at 542-43.

Though the *Liteky* majority held that

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible,[3]

and noted that

> [i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant,[4]

those statements do not address a situation where a judge has decided fact issues in a prior case and then becomes the *trier of fact* in a subsequent case involving different parties. Those different parties have not had an opportunity to meet their accusers' claims and to sway the judge before he makes up his mind and reaches his conclusions. Similarly, *Liteky*'s holding that a judge's recusal is not warranted when a party merely

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[3] *Liteky*, 510 U.S. at 551.

[4] *Liteky*, 510 U.S. at 555.

complains that the trial judge has predetermined the law or legal policy does not explain the recusal standard when the trial judge has predetermined the facts and will then be the trier of fact in the party's case.

This critical distinction appears to be lost on federal courts analyzing Section 455 claims such as Petitioners' in connection with *Liteky*. For example, the Fifth Circuit's analysis and summary dismissal of this argument in Petitioners' appeal consisted entirely of the following:

> Appellants contend that *Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder. There is no support for this position legally or logically. Judges often find facts in performing their duties–in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases. *Liteky* draws no distinction based on the type of proceeding, and none is warranted.

(Appendix B at 31a-32a.) Similarly, in *Beiber v. Department of the Army*, the D.C. Circuit discussed the effect of *Liteky* on a party's attempt to recuse a fact-finding administrative judge. *See* 287 F.3d 1358, 1363 (D.C. Cir. 2002). Utilizing the same dearth of analysis, the court opined that "[a]lthough [other recusal decisions] involve the conduct of judges presiding over jury trials rather than bench trials, we think the same standard ought to apply regardless of whether the trier of fact is a jury or judge."

This failure of analysis demonstrates that federal courts either do not understand, are ignoring, or are too deeply discounting the relevance of intrajudicial rulings in determining a judge's recusal when he is also the trier of fact. Because of this, the Court should grant certiorari in this case and clarify whether *Liteky* applies to cases in which the judge

acts as trier of fact and has predetermined central fact issues based on rulings made in prior cases against different parties, or whether disqualification is automatic.

2. Many Federal Circuit Courts Have Held That a Trial Judge's Role as Trier of Fact Is an Important Factor in Determining Recusal

Aside from the Fifth and D.C. Circuits, most federal circuits have neither determined the exact weight to be given to the judge's role as trier of fact for purposes of recusal, nor stated clear guidelines nor analyzed this issue in the context of the *Liteky* standard. However, many indicate that the judge's role as trier of fact is a weighty consideration. This Court should consider these decisions in determining the standard for judicial recusal where the judge acts as fact finder.

In *Alexander v. Primerica Holdings, Inc.*, the Third Circuit required a trial judge's recusal under Section 455 because, among other reasons, he was already on record favoring the defendant on potentially dispositive issues. *See* 10 F.3d 155, 163-64 (3d Cir. 1993). Noting that "the outcome of this case 'would be shrouded [in] suspicion' if [the trial judge] were to continue to preside as trier of fact," the court noted that "[w]e cannot overlook the fact that this is a non-jury case, and that [the trial judge] will be deciding each and every substantive issue at trial. *Id.* at 163. Ultimately holding that recusal was warranted, the court emphasized that "[w]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Id.* at 166.

In *Webbe v. McGhie Land Title Co.*, the Tenth Circuit reversed the trial court's order granting summary judgment against the defendant. *See* 549 F.2d 1358, 1360-61 (10th Cir. 1977). It then ordered the judge to disqualify himself under

Section 455 because, without reading the depositions, and based on the oral argument of counsel for plaintiff and third-party defendant, he announced that the defendant was "stuck" [*i.e.*, had lost the case] before even permitting counsel for defendant to address the court. *Id.* at 1361. Concluding that the trial court had clearly resolved the fact issues in the case, the Tenth Circuit ordered his recusal, reasoning that:

> To us there is not a reasonable likelihood that the trial judge in the instant case, having now been reversed for granting summary judgment, could later preside over the trial of this matter in a fair and impartial manner, or, in the event he became the trier of the facts, that he could do so with detachment and objectivity.

Id.

In *Camacho v. Autoridad,* the targets of federal wiretapping brought suit seeking damages and equitable relief against telephone companies and officials who participated in the wiretapping at the behest of federal officers. *See* 868 F.2d 482, 484 (1st Cir. 1989). Following the district court's dismissal of the suit, plaintiffs appealed, alleging that the trial judge erred by refusing to recuse himself under Section 455. *Id* at 490. Plaintiffs based this claim of error on the fact that the judge "had issued some (or all) of the orders authorizing the electronic surveillance and thus had 'prior knowledge of the facts . . . which tainted his view [of plaintiffs' case].'" *Id.* (omission in original). Flatly rejecting this argument, the First Circuit held that a trial judge did not have to recuse himself because, in dismissing the suit, "the judge performed no fact finding and exercised no discretion." *Id.*

Finally, the Fifth Circuit has employed similar reasoning in denying an appellant's argument that a trial judge's failure to recuse under Section 455 was error. *See Travelers Ins. Co.*

v. Liljeberg Enterprises, Inc., 38 F.3d 1404 (5th Cir. 1994). In *Traveler's*, the court upheld a trial judge's order denying recusal, reasoning that "a jury, not the district judge, considered the facts and evaluated the credibility of the witnesses." *Id. at* 1412 (5th Cir. 1994).

These cases clearly demonstrate that, contrary to the Fifth Circuit's finding below, legal and logical support exists for concluding that a judge should not act as fact finder on issues that he has resolved in prior proceedings.[5] This proposition applies with added force in cases (like Petitioners) where a judge has predetermined fact issues in prior cases against certain parties, and subsequently acts as fact finder over a subsequent case involving the same issues raised by different parties.

3. Other Authorities Support the Recusal of a Trial Judge When He Is Trier of Fact and Has Predetermined the Issues

Legal commentators agree that, where a judge is called upon to preside in a case or decide facts ruled on in a previous instance, an appearance of partiality exists:

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[5] *See also United States v. Scaccia*, 514 F. Supp. 1353, 1355-56 (N.D.N.Y. 1981) (finding that trial judge was not disqualified from sitting in criminal prosecution even though he had previously sentenced defendant and presided over defendants' probation revocation hearing because the "critical" distinction between the revocation hearing and the trial is that "the *finder of fact* upon the trial here will be the jury, not the court . . . ."); *United States v. Sepulveda*, 512 F. Supp. 592, 594 (D.D.C. 1981) (reasoning that trial judge need not recuse himself following reversal of conviction and remand for new trial because "[the] Court was *not sitting as the trier of fact* and would not be doing so during the retrial. . . .") (all emphases added).

> While it may be difficult to prove personal bias when a judge reviews his or her prior decisions, the appearance of partiality exists when a *judge is asked, in effect, to "second-guess" the prior decision.*

Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1054 n.30 (1993) (emphasis added).

Other authorities concur with this statement. For example, in a recent monograph intended "to assist [federal] judges in ruling on recusal," the Federal Judicial Center ("FJC") strongly suggests that "the standard for recusal differs in a bench trial." (Appendix E at 82a: Alan Hirsch and Kay Loveland, *Recusal: Analysis of Case Law under 28 U.S.C. §§ 455 and 144*, v, 59 (Federal Judicial Center 2002)). In particular, the FJC begins by stating that "[t]he question arises whether the standard for recusal differs in a bench trial, where the judge's role is even more pivotal than in a jury trial." *Id.* at 82a. Relying primarily on the Third Circuit's decision in *Alexander*, discussed *supra* at 10, the FJC reasons that in situations where a judge will be determining facts or issues that he has previously ruled on, recusal is appropriate. *Id.* at 59. At minimum, however, the FJC recusal article confirms Petitioners' claim that clarification is needed as to whether the *Liteky* standard applies to cases where a judge has predetermined fact issues in prior cases, and subsequently acts as fact finder over a case involving the same issues raised by different parties.

4. When a Trial Judge Is the Trier of Fact, the Standard for Juror Impartiality Is a Relevant Consideration

Because of Judge Smith's role as sole juror, the standard for juror disqualification is relevant and supports Petitioners' claim that a judge must recuse himself where he has

predetermined fact issues in prior cases, and subsequently acts as fact finder over a subsequent case involving the same issues but filed by different parties. For example, a number of courts have held that when two or more persons are charged with the same or related offenses arising from the same transaction and are tried separately, a juror who has voted to convict in one case is not competent to sit in another. *See United States v. Haynes*, 398 F.2d 980 (2d Cir. 1968); *Casias v. United States*, 315 F.2d 614 (10th Cir. 1963); *Everitt v. United States*, 281 F.2d 429 (5th Cir. 1960); *Lett v. United States*, 15 F.2d 690 (8thCir. 1926); *see also United States v. Stevens*, 444 F.2d 630 (6th Cir. 1971).

Although these decisions all involve the Sixth Amendment guarantee of an impartial jury, they are clearly analogous to Petitioners' claims. First, the Seventh Amendment to the United States Constitution guarantees a party the right to an impartial jury in civil cases. *See* U.S. CONST. amend VII; *Olson v. Bradrik*, 645 F. Supp. 645, 653 (D. Conn. 1986) ("[The impartiality of the juror] is inherent in the [Seventh Amendment's] right of trial by jury . . . ."). Second, and as discussed in more detail below, Judge Smith's orders in prior cases evidence his predetermination of the merits of Petitioners' FTCA claims well before trial.

5. Judge Smith's Predetermination of the Key Fact Issues

Petitioners' case presents a clear picture of why a judge who has previously decided certain fact issues and subsequently acts as trier of fact in a different case on the same issues cannot be properly analyzed under the *Liteky* recusal standard. Judge Smith's prior factual rulings so certainly and completely determined Petitioners' case, that he could not act as an impartial fact finder. Because of this, Judge Smith's disqualification was required by Section 455.

In presiding over *United States v. Branch*, the 1994 criminal case against certain Branch Davidians, none of whom are Petitioners, Judge Smith announced *his* factual conclusions, mostly during sentencing, which predetermined the key, disputed fact issues in Petitioners' case. On the central, disputed issues regarding the government's February 28 assault, he concluded that (1) the Branch Davidians "ambush[ed]" the ATF agents on February 28, 1993 (Supp. Vol. 3 at 638); (2) they "engaged in a conspiracy to cause the deaths of federal agents"(*Id.*); (3) "the first shots were fired from inside the front door of the compound" (*Id.*); (4) the Davidians were committed to "bring[ing] about a violent conflict with federal agents" and "forc[ed] the agents to use deadly force against them"(*Id.*); and (5) but for skilled lawyering by defense counsel in *Branch*, the jury would have convicted more defendants of murder (*Id.* at 391). He also emotionally spoke about gruesome photos of dead ATF agents and vividly described his belief that the Branch Davidians shot a helpless ATF agent (*Id.* at 395). Judge Smith has not limited these opinions to the *Branch* defendants, but has concluded that many of the Branch Davidian decedents, whose estates are Petitioners in these civil cases, were equally guilty of "ambushing" and conspir[ing] to cause the death of" ATF agents (*Id.* at 638).

Regarding federal agents' April 19, 1993 assault, Judge Smith concluded that the Branch Davidians (1) started the April 19, 1993 fire that consumed Mt. Carmel and its inhabitants (Supp. Vol. 3 at 399); (2) were heard on the FBI surveillance tapes planning a fire (*Id.* at 395); and (3) "murder[ed]" each other (*Id.* at 638).

As to the Branch Davidians' religious beliefs and practices, Judge Smith's *Branch* conclusions were that the Davidians (1) defrauded credit card companies of "huge sums" of money to "acquire an armory that would rival that

of the National Guard unit's"; (2) turned Mount Carmel, their place of worship and home for their families, into "a literal fortress"; (3) practiced a religion designed to "bring about a violent conflict with federal agents"; and (4) had "ammunition in an unbelievable quantity." (*Id.* at 638.) Judge Smith independently reached all these conclusions about what happened on February 28 and April 19, 1993, and about the Branch Davidians' lifestyle and religion. They were not in, or necessary to, the *Branch* jury's verdict. (Supp. Vol. 3 at 681-687.)

Judge Smith was so certain of his factual conclusions that he restated some of them in his summary judgment in *Risenhoover v. Cox,* a case brought in his Court by ATF agents and their families against various media organizations and an ambulance company, alleging that these defendants alerted the Branch Davidians to the ATF's February 28 assault, thereby causing the agents' injuries and deaths. (Supp. Vol. 3 at 788.) Judge Smith concluded that (1) the Branch Davidians started the April 19, 1993 fire; (2) they had to be "surprise[d]" by the ATF's assault or lives would be lost; (3) Koresh was a "false prophet;" (4) they ignored the "Golden Rule" and "focus[ed] on paramilitary training"; and (5) the Branch Davidians shot first on February 28, 1993, without adequate provocation. (*Id.* at 789-92, 806-07.)

These firmly-held conclusions effectively created a collateral-estoppel effect on Petitioners' claims. That is, based on his factual conclusions in *Branch* and *Risenhoover*, Judge Smith predetermined the merit of Petitioners allegations that: (1) the February 28 assault was executed with excessive force (Vol. 24 at 5311, ¶7.9), including the ATF firing the first shots without adequate provocation (Vol. 24 at 5314, ¶7.9f), and (2) the April 19 assault was executed with excessive force (Vol. 24 at 5338, ¶7.25) and caused the April 19 fire (Vol. 24 at 5343-47, ¶7.9(s-ff)). Based on this record,

Petitioners' FTCA claims were clearly determined by Judge Smith prior to trial. Neither Section 455 nor this Court's decision in *Liteky* should be read to countenance such an obvious example of judicial prejudice and bias.

B. This Court Should Hold That the *Liljeberg* Harm Analysis Applies Only to Recusal Error Raised in Post-Judgment Motions Such as Those Filed under Federal Rule of Civil Procedure 60(b)(6)

A related issue in Petitioners' case which has not been clearly addressed by this Court is the necessity of showing harm in a case such as the present. That is, where a party alleges error for failing to recuse in a motion filed prior to rendition of judgment, rather than in a post-judgment motion, is a showing of harm necessary?

In *Liljeberg v. Health Services Acquisition Corporation*, this Court held that, in cases where a judge's failure to recuse under Section 455(a) results in erroneous denial of a Rule 60(b)(6) motion, "there is surely room for harmless error." *See* 486 U.S. 847, 864 (1988). In the instant case, Petitioners' Section 455 Motions to Recuse were not raised post-judgment via Rule 60(b)(6), but prior to rendition of judgment. Citing to its prior decision in *In re Continental Airlines Corporation*, 901 F.2d 1259, 1263 (5th Cir. 1990), the Fifth Circuit nevertheless applied *Liljeberg*'s harm analysis and, as an alternative basis for affirming the district court's order denying recusal, determined that no harm resulted. (Appendix B at 33a.)

This interpretation, *i.e.*, that a harmless error standard applies to all error for failure to recuse under Section 455, appears to misinterpret *Liljeberg* and other precedent by this Court. First, and as argued by Fifth Circuit Justice Dennis in

his thorough and well-reasoned dissent in *United States v. O'Keefe*:

> [T]he [*Liljeberg*] opinion as a whole clearly indicates that the three [harm] factors it mentioned as "appropriate to consider" were not meant to be used as a freestanding 'harmless error' rule, but as a non-exclusive list of equitable considerations, which courts may use along with other established equitable precepts, to guide sound and wise exercise of judicial discretion ***in deciding Rule 60(b)(6) motions*** based on § 455 violations."

169 F.3d 281, 287 (5th Cir. 1999) (Dennis, J., dissenting) (emphasis added). This reasoning, *i.e.*, that the *Liljeberg* harm requirement only applies to Section 455 violations raised in a Federal Rule of Civil Procedure 60(b)(6) motion to reconsider, is consistent with prior decisions of the U.S. Supreme Court regarding harm requirements.

For example, in *Chapman v. State of California*, this Court examined whether the denial of an accused's right to invoke the Fifth Amendment and refuse to testify against himself could be held harmless. *See* 386 U.S. 18, 20 (1967). Prior to addressing this issue, the Court stated that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. One of the three examples included in this category of rights was that of an "impartial judge." *Id.* at n.8. Based on the *Chapman* decision, *Liljeberg* should only apply to claims of Section 455 violations raised post-judgment such as those filed pursuant to Rule 60(b)(6).

Other circuits have similarly questioned the application of *Liljeberg's* harm analysis to Section 455 recusal claims raised

prior to judgment. *See United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989). In *Kelly*, a case involving a claim of bias under Section 455, the court noted that:

> Although the Court's reasoning in *Liljeberg* would appear to apply equally to reversal of a final judgment on appeal, the Court noted that Rule 60(b)(6) has traditionally been applied only in "extraordinary circumstances." (Citation omitted). Thus, the standard for reversal on appeal in cases involving section 455(a) violations may not be as stringent as the three-part test enunciated in *Liljeberg*.

Id. at 747, n.27. The Sixth Circuit has gone even further, concluding that a party's claim of judicial bias does not implicate a harmless error review: "judicial bias [] is a structural error and, if found, requires automatic reversal." *Maurino v. Johnson*, 210 F.3d 638, 645 (6th Cir. 2000). Citing to this Court's decision in *Chapman*, the *Maurino* court subsequently reiterated this principle: "[b]ecause judicial bias infects the entire trial process it is not subject to harmless error review." *Id.* Similarly, the Seventh Circuit has concluded that "there is no harmless error analysis relevant to the issue of judicial bias." *Bracy v. Schomig*, 286 F.3d 406, 414 (7th Cir. 2002).

Based on these authorities, the Fifth Circuit's application of *Liljeberg's* harm analysis to any finding of judicial bias, and not merely bias raised in a Rule 60(b)(6) motion, conflicts with decisions from the Sixth and Seventh Circuits, and ostensibly with the *Chapman* opinion, on the same important matter. Accordingly, Petitioners urge this Court to grant certiorari and clarify whether the *Liljeberg* harm analysis applies broadly to all cases involving an erroneous failure to recuse under Section 455 (including cases such as Petitioners' where the judge acts as trier of fact), or merely to cases where

a judge's erroneous failure to recuse is raised in a Rule 60(b)(6) motion.

II. The Fifth Circuit's Decision Dismissing Petitioners' Appeal Is Such an Extreme Departure from the Accepted and Usual Course of Recusal Proceedings as to Call for an Exercise of this Court's Supervisory Power

An alternative reason for granting Petitioners' Writ is that, even under the *Liteky* standard, the Fifth Circuit's decision affirming Judge Smith's refusal to recuse represents an egregious departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court should grant certiorari to prevent such an extreme departure from the accepted and usual course of judicial proceedings which entitles a party to have a fair and impartial fact-finder, as well as presiding judge, in their case.

A. Standard for Recusal Determination

Based on this Court's decision in *Liteky*, the standard for determining the necessity of recusal depends on the source of the judge's alleged prejudice or bias. To the extent that a judge has become biased or impartial due to facts he has learned during a judicial proceeding, *i.e.*, intrajudicial bias, he must recuse himself only if he displays "such a high degree of favoritism or antagonism [toward a party] that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. If the alleged partiality stems from a source other than a judicial proceeding, *i.e.*, extrajudicial bias, a judge must recuse himself if "a reasonable and objective person, knowing all of the facts, would harbor doubts concerning the judge's partiality." *United States v. Jordan*, 49 F.3d 152, 155-56 & n.3 (5th Cir.1995) (stating that *Liteky* "neither stated nor implied that th[e] 'impossibility of fair judgment test' would

supplant the reasonable person standard in cases involving alleged bias from an extrajudicial source") (internal quotes added).

B. Judge Smith's Intrajudicial Bias

1. Judge Smith's Rulings in *Branch* and *Risenhoover* Concerning the February 28, 1993 and April 19, 1993 Assaults Demonstrate His Clear Inability to Render Fair Judgment

Even assuming disqualification is not automatic and that *Liteky* applies to Petitioners' recusal claim despite Judge Smith's fact-findings in *Branch* and *Risenhoover*, recusal was still necessary because such findings demonstrated his "clear inability to render fair judgment." *See Liteky*, 510 U.S. at 551. In support of this contention, Petitioners reference their recitation of fact found at pages 14-16, *supra*.

2. Judge Smith's Negative Characterization of Davidians and Their Religious Beliefs Reveal a High Degree of Antagonism Toward Petitioners Which Made Fair Judgment Impossible

Prior to trial of Petitioners' case, Judge Smith had clearly displayed his disdain for all Davidians, both orally and in writing. For example, in his summary judgment order and opinion from the *Risenhoover* case, Judge Smith referred to David Koresh, the deceased spiritual leader of the Davidians, as a "false prophet" whose religious teachings did not focus on the "Golden Rule" but paramilitary training. (Supp. Vol. 3 at 837-38.) During the *Branch* defendants' sentencing hearing, he described the Davidian's religious beliefs as a "fanaticism . . . difficult for most people to understand" and its followers as "soft clay" who were "easily manipulated." (Supp. Vol. 3 at 399.) Other indications of Judge Smith's

bias against Davidians can be seen in his order denying the *Branch* criminal defendants' motion in limine regarding the use of the word "cult" to describe their religion. (Supp. Vol. 3 at 882-83.)

3. Judge Smith's Bench Remarks Demonstrate a High Degree of Antagonism Toward Petitioners Which Made Fair Judgment Impossible

On July 13, 2000, the government introduced surveillance tapes and transcripts of conversations by certain Davidians regarding the events of April 19, 1993. During their rebuttal case, Petitioners introduced their own transcripts of these tapes which differed significantly from the transcripts prepared by the government's expert. When counsel for Petitioners attempted to play sections of these surveillance tapes and provide the advisory jury with their version of the transcripts, Judge Smith, acting *sua sponte*, called both parties to the bench and angrily dismissed Petitioners' transcripts as "bullcrap" and initially refused to allow the jury to be provided with these competing transcripts. (Vol. 102 at 3064; Supp. Vol. 4 at 887, ¶ 3.) Interestingly, at the time Judge Smith characterized these transcripts as "bullcrap," he had neither reviewed them nor the underlying surveillance tapes they represented.

Nevertheless, when Petitioners advised Judge Smith that the government had raised no objection to the admission of these competing transcripts, he relented and admitted them. (Vol. 102 at 3064). Prior to their admission, however, Judge Smith expressed the following caveat to the advisory jury and in doing so provided further proof of his partiality in this case:

> Members of the jury, before we listen to this tape, let me remind you once again that the evidence is what

> you hear. The transcripts are merely intended to assist you in understanding something that as you know is difficult to hear. One thing you may take into consideration is that [the government's expert] Mr. Ginsberg made a major part of these transcripts and he–you heard him testify as to his expertise and the amount of time he spent. ***The other comparative transcript was made by one of [Petitioners'] lawyers who obviously has an interest in the case.*** You should take that into consideration.

(Vol. 102 at 3064). These comments amount to nothing less than Judge Smith's instruction to the jury to discredit Petitioners' transcripts or to at least treat them with extreme skepticism. While the jury's verdict in this case was only advisory, and thus did not directly harm Petitioners, these comments clearly demonstrate the impossibility of a fair trial based on the preconceived biases and antagonisms that Judge Smith bore toward Appellants, their claims, and their evidence.

4. Judge Smith's Disparagement of Davidian Witness Livingstone Fagan Demonstrates a High Degree of Antagonism Toward Petitioners Which Made Fair Judgment Impossible

Petitioners, during their case-in-chief, offered excerpts from the deposition testimony of Livingstone Fagan, a resident of Mount Carmel during the government's February 28, 1993 assault. (Vol. 92 at 971.) Shortly after this testimony began, Judge Smith, again acting *sua sponte*, ordered counsel to approach the bench. (Vol. 92 at 971.) Once at the bench, Judge Smith referred to Fagan as a "crazy, murdering son-of-a-bitch" and expressed a willingness to exclude Fagan's testimony if the government wished (Fagan

had refused to take the oath on religious grounds). (Vol. 92 at 971; Supp. Vol. 4 at 887, ¶ 4.) Judge Smith, in his Findings of Fact and Conclusions of Law, subsequently attempted to mitigate the harshness of this undignified and prejudicial statement with the following: "[t]hat statement [concerning Fagan] was off the record and in response to another lawyer's humorous suggestion, and was not in any way intended to be taken seriously. The Court regrets the slight to Mr. Fagan's Mother, should he have one." (Vol. 60 at 14641.)

Much like his remarks about Petitioners' religious beliefs, Judge Smith's use of an expletive to describe a member of Petitioners' religious circle demonstrates a high degree of antagonism towards Petitioners which made fair judgment impossible. Moreover, the personal slight to Mr. Fagan necessarily extends to his mother, Doris Fagan–the "bitch." Because Ms. Fagan's estate was a plaintiff to this action, the remark expresses a high degree of prejudice against Petitioners and their claims which made fair judgment impossible in this case.

C Judge Smith's Extrajudicial Bias

1. Judge Smith's Words of Praise for Defendant's Counsel Cast Doubt on His Impartiality in This Case

At one point during trial, government attorney James Touhey concluded a particularly vicious cross-examination of Davidian witness Clive Doyle. (Vol. 93 at 1290.) Mr. Doyle had been a defendant in the *Branch* criminal trial, but was acquitted of all charges. (Supp. Vol. 3 at 682-87.) Mr. Touhey's cross-examination, described by the press as "most intense" and "often combative," ultimately resulted in Mr. Doyle being reduced to tears. (Supp. Vol. 4 at 886, ¶ 2.)

Following the completion of Mr. Doyle's cross-examination, the court took a brief recess. (Vol. 93 at 1290.) During the recess, Petitioners' counsel observed Judge Smith enter the courtroom and approach Mr. Touhey. (Supp. Vol. 4 at 886-87, ¶ 2.) Upon reaching him, Judge Smith patted him on the back, shook his hand, and commended him, saying "good job, Mr. Touhey!" (Supp. Vol. 4 at 887, ¶ 2.) All of this occurred in the presence of numerous courtroom observers. (Supp. Vol. 4 at 887, ¶ 2.)

In directing the Court to this particular assertion of partiality, Petitioners understand that a judge's "compliments [given] in the course of legal proceedings should not ordinarily support a [Section 455] challenge." *Lloyds v. Oryx Energy Co.*, 944 F. Supp. 566, 568 (S.D. Tex. 1996). However, Judge Smith's interaction with Mr. Touhey carried the appearance of more than a mere compliment, this based on the manner and context in which it was given. *See Andrade*, 338 F.3d at 455 (citing *Sao Paulo State of Federative Rep. of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232-33, (2002) for proposition that "review [of bias allegations] ***should entail a careful consideration of context***"). Specifically, Judge Smith's compliment and partial embrace of Mr. Touhey strongly resembled a form of congratulation for causing Mr. Doyle to break down and sob, especially since it occurred almost immediately after Mr. Touhey concluded his cross-examination.

Regardless of Judge Smith's motivation for congratulating Mr. Touhey, this action created at least an appearance that he approved of the result of Mr. Touhey's cross-examination and was thus partial to Respondent. *See Jordan*, 49 F.3d at 157 fn.8 (stating that Section 455 is concerned with "the appearance of impropriety" and not necessarily actual impropriety).

2. The Provision of Gifts by Department of Justice Employees to Trial Court Employees Would Cause Reasonable and Objective Persons to Harbor Doubts as to the Court's Impartiality in this Case

Prior to judgment, counsel for Appellants learned that counsel for the government had conveyed gifts during the trial to certain officials of the court. As confirmed in the Declaration of Senior Trial Counsel for the government, these gifts consisted of the following: (1) eleven T-shirts presented to visiting and Waco-based deputy U.S. Marshals with the words "U.S. Marshals, Waco, Texas/'The Good Guys'" printed on the front and the letters "W.W.P.D." printed on the back[6]; (2) food and beverages (presumptively alcoholic as they "were purchased with personal funds") on several instances during after-hours socializing purchased for "certain marshals" and "contractors"; (3) homemade cookies (from Ms. Hagen) presented to employees of the Clerk of the Court, the U.S. Marshals Service, and the Court Reporter; and (4) several bags of candy presented to the Clerk's Office. (Vol. 60 at 14597-98).

In denying Petitioners' recusal grounds involving such gifts, Judge Smith first addressed Ms. Hagen's gift of T-shirts and summarily dismissed them as "a prank played on a deputy marshal" who was "not part of the court's staff." (Vol. 60 at 14711). Judge Smith then turned to Ms. Hagen's gift of chocolate chip cookies, but likewise dismissed the claim on the ground that the recipients of the cookies were "not

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[6] "WWPD," an abbreviation for the phrase "What Would Parnell Do," was a reference to Parnell McNamara, one of Judge Smith's longtime courtroom deputies who frequently accompanied Judge Smith during trial of Petitioners' case. (Vol. 60 at 14597-98.)

members of the Court's staff." (Vol. 60 at 14710). Nowhere in Judge Smith's order denying Petitioners' second motion to recuse is any mention made of the "after-hours socializing" which occurred between government attorneys and "certain marshals" and "contractors." The Fifth Circuit adopted Judge Smith's reasoning and summarily dismissed Petitioners' argument, characterizing these events as "courtesies." (Appendix B at 20a.)

While these individuals may not have been part of Judge Smith's staff in a technical sense, their everyday presence in his courtroom creates a reasonable presumption to members of the public that they are under his authority (as, indeed, they are)–and thus an appearance of impropriety. This exact point was made very clear by the New Jersey Supreme Court in *In the Matter of Randolph*. *See* 502 A.2d 533 (N.J. 1986). In *Randolph*, the petitioner (Randolph) was hired by the Sheriff of Monmouth County to serve as a uniformed court attendant performing various tasks such as swearing in witnesses, supervising parties and witnesses, etc. *Randolph*, 502 A.2d at 534. Upon learning that Randolph held positions on various public and local government agencies frequently involved in political activity, the County ordered the Sheriff's department to reassign her to duties outside the courtroom should she continue to be involved in these agency positions. *Id.*

Affirming this order, the Supreme Court of New Jersey agreed with the lower court that Randolph's various positions in these agencies created "a clear danger to the appearance of neutrality that must be maintained by all connected with the judiciary, including judges and employees." *Id.* at 530. In reaching this decision, the court reasoned that:

> More is at stake here than proof of prejudice. We think that there is a much more subtle value involved,

and do not think the Constitution prevents us from promoting such values, even if they are difficult to describe or prove, so long as they represent something very important. There is a tone, a feeling, an atmosphere, of impartiality that should surround everything that has to do with the judiciary. ***That subtle value is destroyed or damaged each time that someone closely connected with the courts does something that judges should not do even though they are not judges.*** The value involved is enormous. It is not just "trusting the court." It is a feeling of total confidence that when you step into a courtroom, you are inside an institution that has taken every care not only to judge your case fairly but to give you confidence that it will be judged fairly. . . . ***When a judge confers closely with a court aide, is seen with that court aide regularly, has that court aide at the right hand to help in the many things that have to do with the court itself, even if not with its decisions, people simply have the right to wonder just how non-partisan the court really is.***

These are not abstract concerns. These are the realities of human experience. What litigants experience is the public face of justice. It is a face that includes much more than the judges; ***it includes everyone who works in that courtroom and everything that worker portrays to the public***. The face that the public sees should have the appearance of total honesty and total impartiality. That impartiality will be lost when the visible face of the judicial system, presented through its employees in a courtroom, portrays a commitment not only to one of

> the parties or issues involved in litigation before the court but to any partisan cause.

Id. at 547-48 (emphasis added).

While the *Randolph* decision is not binding on federal courts, its reasoning is powerful–so much so that the Fifth Circuit panel chose not to discuss or even acknowledge Petitioners' citation to it. Much like *Randolph*, the district court's "atmosphere of impartiality" was destroyed, or at least damaged, in this case considering the free gifts given to court personnel. In addition, the complimentary wining-and-dining of many of the same court personnel (Deputy Marshals/baliffs)–who are closely connected and regularly seen with Judge Smith and thus represent the "visible face of the judicial system"–further damaged the court's atmosphere of impartiality. Accordingly, Petitioners submit that this gift giving and other social intercourse between court personnel and counsel for Respondents created an appearance of impropriety among reasonable persons which required Judge Smith's recusal under Section 455. *See Jordan*, 49 F.3d at 156-57.

3. Other Evidence of Bias

Other evidence of Judge Smith's bias and prejudice, both intrajudicial and extrajudicial, consists of Judge Smith's: admission that he "never read" Petitioners' evidence prior to announcing his intent to grant defendant's summary judgment motion (Supp. Vol. 4 at 886, ¶1); engagement, prior to entering his findings of fact, conclusions of law, and judgment, in *ex parte* conversations with a reporter about the merits of Petitioners' case (Appendix B at 25a); refusal to certify and approve Petitioners' Federal Rule of Appellate Procedure 10(c) Statement of Proceedings regarding his off-record comments–despite the lack of any substantive disagreement on their content by the government (Supp. Vol.

4 at 969); and, intentional misapplication of numerous aspects of Texas law in the court's charge to the advisory jury in an attempt to engineer an advisory verdict that would not conflict with his preconceived verdict (Vol. 58 at 14251-255).

Any fair assessment of the facts recited above, in whole or part, supports a conclusion that 28 U.S.C. Section 455(a) and (b)(1) required Judge Smith's recusal for bias–both real and perceived. Judge Smith's failure to do so, and the Fifth Circuit's opinion finding no basis for recusal, thus represent a departure from the accepted and usual course of judicial proceedings sufficient to justify exercise of this Court's supervisory power.

CONCLUSION

For all the reasons expressed above, Petitioners respectfully request that this Honorable Court grant their Petition for Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50154

[Filed September 8, 2003]

ISABEL G ANDRADE; ET AL
Plaintiffs

STEPHEN E THOMPSON, as administrator for the following estates: Estate of Chanel Andrade, Estate of Crystal Barrios, Estate of Isaiah Barrios, Estate of Dayland Lord Little, Estate of Kara Brittani (Pages) Little, Estate of Abigail Martinez, Estate of Audrey Martinez, Estate of Joseph Martinez, Estate of Melissa Morrison, Estate of Mayanah Schneider, Estate of Aisha Gyarfas Summers, Estate of Startle Summers, Estate of Hollywood Sylvia, Estate of Rachel Sylvia; DANIEL MARTINEZ, SR; THOMAS BARRIOS; MISTY DAWN FERGUSON; STANLEY SYLVIA; NORMAN WASHINGTON ALLISON; ADELINE SYLVIA BLACK; LOWESS ESMERELLA BLAKE; ROBERT THEOPHILUS BLAKE; DEBORAH BROWN, ET AL
Plaintiffs - Appellants

v.

PHILLIP J CHOJNACKI; ET AL
Defendants

UNITED STATES OF AMERICA,
Defendant - Appellee

JEAN HOLUB, Co-Administrator & Legal Representative of Estates of Bobbie Lane Koresh, Star Hadassah Howell & Cyrus Ben Joseph Howell Minors, Deceased
Plaintiff - Appellant

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; PHILLIP J CHOJNACKI; JEFFREY J JAMAR; ROBERT RICKS; RICHARD (DICK) ROGERS;
Defendants - Appellees

MISTY DAWN FERGUSON; ET AL
Plaintiffs

MISTY DAWN FERGUSON; ROBERT THEOPHILUS BLAKE; LOWESS ESMERELLA BLAKE; DEBBORAH K BROWN, SHERRY H BURGO; ET AL
Plaintiffs - Appellants

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; WILLIAM S SESSIONS; LAWRENCE A POTTS; DANIEL M HARTNETT; EDWARD DANIEL CONROY; DAVID C TROY; PHILLIP J CHOJNACKI; CHARLES A SARABYN; PETER B

MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL K DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY J JAMAR; ROBERT A (BOB) RICKS; OLIVER B REVELL; RICHARD (DICK) ROGERS; LON T HORIUCHI; BYRON SAGE; STEPHEN E HIGGINS; UNITED STATES OF AMERICA

Defendants - Appellees

DEBBORAH BROWN, ROBYN BUNDS, Individually and on behalf of minor child Shaun Wisdom Howell Koresh; SHERRY HOUTMAN BURGO; CLIVE DOYLE; KATHERINE FARRIS; ET AL

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA; ET AL

Defendants

UNITED STATES OF AMERICA; JANET RENO, Attorney General; WILLIAM S SESSIONS; LAWRENCE POTTS; STEPHEN HIGGINS; DANIEL HARTNETT; DANIEL CONROY; DAVID C TROY; PHILLIP CHOJNACKI; CHARLES (CHUCK) SARABYN; PETER MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY JAMAR; ROBERT RICKS; OLIVER REVELL; RICHARD (DICK) ROGERS; LON T HORIUCHI; BYRON SAGE; TIMOTHY GABORIE; JOHN MCGAW; WILLIAM T JOHNSTON

Defendants - Appellees

JAMES LOYE RIDDLE; ET AL

Plaintiffs

MYRTLE ANN RIDDLE
Plaintiff - Appellant

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; WEBSTER L HUBBELL; WILLIAM S SESSIONS; LAWRENCE A POTTS; STEPHEN E HIGGINS, Director, ATF; DANIEL CONROY; DAVID C TROY; PHILLIP J CHOJNACKI; CHARLES A SARABYN; PETER B MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL K DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY JAMAR; ROBERT A (BOB) RICKS; OLIVER B REVELL; RICHARD ROGERS; LON T HORIUCHI; BYRON SAGE; UNITED STATES OF AMERICA
Defendants - Appellees

OLIVER GYARFAS, Individually and as Administrator of the Estate of Aisha Gyafas Summers Deceased and of the Estate of Startle Summers Deceased; ELIZABETH GYARFAS, Individually and as Administrator of the Estate of Aisha Gyarfas Summers Deceased and of the Estate of Startle Summers Deceased
Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA
Defendant - Appellee

JEAN HOLUB, Co-Administrators and Legal Representatives

of the Estates of Bobbie Layne Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor Children Deceased; BOBBY WAYNE HOWELL, Co-Administrators and Legal Representatives of the Estates of Bobbie Layne Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor Children Deceased

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

DEBBORAH BROWN; SHERRY HOUTMAN BURGO; CLIVE DOYLE; TILLIE FRIESEN; FLOYD HOUTMAN, JR; ET AL

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

STANLEY SYLVIA; ET AL

Plaintiffs,

STANLEY SYLVIA; NORMAN WASHINGTON ALLISON; LUCILLE MAYNARD; ADELINE SYLVIA BLACK; LOWESS ESMERELLA BLAKE; ET AL

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeals from the United States District Court
for the Western District of Texas, Waco

ON PETITION FOR REHEARING EN BANC

(Opinion 7/14/03, 5 Cir., _____, _____F.3d_____)

Before JONES, WIENER and DeMOSS, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
Edith H. Jones
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50154

[Filed July 14, 2003]

ISABEL G ANDRADE; ET AL
Plaintiffs

STEPHEN E THOMPSON, as administrator for the following estates: Estate of Chanel Andrade, Estate of Crystal Barrios, Estate of Isaiah Barrios, Estate of Dayland Lord Little, Estate of Kara Brittani (Pages) Little, Estate of Abigail Martinez, Estate of Audrey Martinez, Estate of Joseph Martinez, Estate of Melissa Morrison, Estate of Mayanah Schneider, Estate of Aisha Gyarfas Summers, Estate of Startle Summers, Estate of Hollywood Sylvia, Estate of Rachel Sylvia; DANIEL MARTINEZ, SR; THOMAS BARRIOS; MISTY DAWN FERGUSON; STANLEY SYLVIA; NORMAN WASHINGTON ALLISON; ADELINE SYLVIA BLACK; LOWESS ESMERELLA BLAKE; ROBERT THEOPHILUS BLAKE; DEBORAH BROWN, ET AL
Plaintiffs - Appellants

v.

PHILLIP J CHOJNACKI; ET AL
Defendants

UNITED STATES OF AMERICA,
Defendant - Appellee

JEAN HOLUB, Co-Administrator & Legal Representative of Estates of Bobbie Lane Koresh, Star Hadassah Howell & Cyrus Ben Joseph Howell Minors, Deceased
Plaintiff - Appellant

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; PHILLIP J CHOJNACKI; JEFFREY J JAMAR; ROBERT RICKS; RICHARD (DICK) ROGERS;
Defendants - Appellees

MISTY DAWN FERGUSON; ET AL
Plaintiffs

MISTY DAWN FERGUSON; ROBERT THEOPHILUS BLAKE; LOWESS ESMERELLA BLAKE; DEBBORAH K BROWN, SHERRY H BURGO; ET AL
Plaintiffs - Appellants

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; WILLIAM S SESSIONS; LAWRENCE A POTTS; DANIEL M HARTNETT; EDWARD DANIEL CONROY; DAVID C TROY; PHILLIP J CHOJNACKI; CHARLES A SARABYN; PETER B

MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL K DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY J JAMAR; ROBERT A (BOB) RICKS; OLIVER B REVELL; RICHARD (DICK) ROGERS; LON T HORIUCHI; BYRON SAGE; STEPHEN E HIGGINS; UNITED STATES OF AMERICA
Defendants - Appellees

DEBBORAH BROWN, ROBYN BUNDS, Individually and on behalf of minor child Shaun Wisdom Howell Koresh; SHERRY HOUTMAN BURGO; CLIVE DOYLE; KATHERINE FARRIS; ET AL
Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA; ET AL
Defendants

UNITED STATES OF AMERICA; JANET RENO, Attorney General; WILLIAM S SESSIONS; LAWRENCE POTTS; STEPHEN HIGGINS; DANIEL HARTNETT; DANIEL CONROY; DAVID C TROY; PHILLIP CHOJNACKI; CHARLES (CHUCK) SARABYN; PETER MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY JAMAR; ROBERT RICKS; OLIVER REVELL; RICHARD (DICK) ROGERS; LON T HORIUCHI; BYRON SAGE; TIMOTHY GABORIE; JOHN MCGAW; WILLIAM T JOHNSTON
Defendants - Appellees

JAMES LOYE RIDDLE; ET AL
Plaintiffs

MYRTLE ANN RIDDLE
Plaintiff - Appellant

v.

JANET RENO, Attorney General; ET AL
Defendants

JANET RENO, Attorney General; WEBSTER L HUBBELL; WILLIAM S SESSIONS; LAWRENCE A POTTS; STEPHEN E HIGGINS, Director, ATF; DANIEL CONROY; DAVID C TROY; PHILLIP J CHOJNACKI; CHARLES A SARABYN; PETER B MASTIN; TED ROYSTER; JAMES CAVANAUGH; EARL K DUNAGAN; DARREL DYER; WILLIAM BUFORD; DAVY AGUILERA; JEFFREY JAMAR; ROBERT A (BOB) RICKS; OLIVER B REVELL; RICHARD ROGERS; LON T HORIUCHI; BYRON SAGE; UNITED STATES OF AMERICA
Defendants - Appellees

OLIVER GYARFAS, Individually and as Administrator of the Estate of Aisha Gyafas Summers Deceased and of the Estate of Startle Summers Deceased; ELIZABETH GYARFAS, Individually and as Administrator of the Estate of Aisha Gyarfas Summers Deceased and of the Estate of Startle Summers Deceased
Plaintiffs - Appellants

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UNITED STATES OF AMERICA
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JEAN HOLUB, Co-Administrators and Legal Representatives

of the Estates of Bobbie Layne Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor Children Deceased; BOBBY WAYNE HOWELL, Co-Administrators and Legal Representatives of the Estates of Bobbie Layne Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor Children Deceased

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

DEBBORAH BROWN; SHERRY HOUTMAN BURGO; CLIVE DOYLE; TILLIE FRIESEN; FLOYD HOUTMAN, JR; ET AL

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

STANLEY SYLVIA; ET AL

Plaintiffs

STANLEY SYLVIA; NORMAN WASHINGTON ALLISON; LUCILLE MAYNARD; ADELINE SYLVIA BLACK; LOWESS ESMERELLA BLAKE; ET AL

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeals from the United States District Court
for the Western District of Texas, Waco
W-96-CV-139
Walter S. Smith, Jr., Chief Judge

Before JONES, WIENER, and DeMOSS, Circuit Judges.

OPINION

EDITH H. JONES, Circuit Judge:

Appellants, some of the survivors and estates of Branch Davidians who died during the 1993 conflict at Mount Carmel near Waco, Texas, attempted to prove at trial that the United States government should be held liable under the Federal Tort Claims Act ("FTCA") for deaths and injuries of Branch Davidian sect members during the siege of their compound outside Waco, Texas on April 19, 1993. The court, after a month-long trial, rejected their case. The court found that the government's planning of the siege - i.e. the decisions to use tear gas against the Davidians; to insert the tear gas by means of military tanks; and to omit specific planning for the possibility that a fire would erupt - is within the "discretionary function exception" to the government's waiver of immunity. The court also found that the use of tear gas was not negligent. Further, even if the United States was negligent by causing damage to the compound before the fires broke out, thus either blocking escape routes or enabling the fires to speed faster, such negligence did not legally cause the plaintiffs' injuries because some of the Davidians started the fires. The court found that the FBI's decision not initially to allow fire trucks on the property was reasonable because of the risk of injury or death to firefighters who might encounter hostile gunfire from the Davidian compound.

All of these findings and conclusions, and other claims that the court earlier dismissed, were the subject of intense and provocative dispute before the trial court, as they have more generally been to the public ever since that shameful day in American law enforcement. None of the substantive issues are raised in this appeal, however. Instead, Appellants' only serious contention is that Judge Smith – on account of his relationships with defendants, defense counsel, and court staff; prior judicial determinations; and comments during Appellants' trial – should have recused himself from hearing their claims. We conclude that Appellants' allegations do not reflect conduct that would cause a reasonable observer to question Judge Smith's impartiality; they do not necessitate *vacatur* under the law of judicial recusal and the correct standards of review. This court **AFFIRMS** the take-nothing judgment.

BACKGROUND

In the wake of the bloody warrant service, siege, and conflagration of the Branch Davidian compound at Mount Carmel in the spring of 1993, four lawsuits were tried by Judge Smith. One was the criminal prosecution of eleven surviving Davidians for the events surrounding the deaths of four ATF agents (*Branch*). Two were civil actions. One was brought by an ATF undercover agent against fellow federal employees and a psychiatrist. The other was brought by federal agents (or their estates) against a reporter, media organizations, and an ambulance service, asserting that the defendants had caused their injuries by alerting Davidians of the impending raid (*Risenhoover*). The fourth is the instant suit, a set of civil actions brought by surviving Davidians and estates of the deceased against the federal government and various other parties.

This suit did not, however, originate in Judge Smith's court. The plaintiffs instead filed suit in Houston, in the Southern District of Texas. The defendants' motion to transfer to Judge Smith's court in the Waco Division of the Western District of Texas was granted. In addition to finding Waco the most convenient forum, the transferring judge dismissed the plaintiffs' allegations of bias. She wrote at the time:

> In effect, Plaintiffs' argument is a collateral motion for recusal, and this Court declines to render a formal ruling on that issue. The merits should be heard upon motion in the Western District of Texas. Plaintiffs' evidence of bias based solely on Judge Smith's prior rulings, [sic] does not create a basis for denial of transfer in this case.

Andrade v. Chojnacki, 934 F. Supp. 817, 835 (S.D. Tex. 1996).

The plaintiffs continued their efforts to avoid Judge Smith's court even after the transfer back to Waco. On the day following Judge Smith's consolidation of their suits, plaintiffs filed a "Motion to Transfer to San Antonio Division or, Alternatively, to Recuse Judge Walter S. Smith, Jr." (hereinafter "First Motion to Recuse"). Judge Smith held a hearing on the motion on June 7, 1996, and denied it eight months later. The plaintiffs then unsuccessfully petitioned this court for a writ of mandamus seeking recusal or transfer to a different venue.

Judge Smith prepared the case for trial. He issued a Memorandum Opinion and Order which dismissed a number of the plaintiffs' claims, narrowing the issues for trial down to several FTCA claims against the United States. *Andrade v. Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999). He

scheduled discovery and submission of a joint pre-trial order, and set trial to begin in October 1999. The trial was later rescheduled for the following summer. Upon plaintiffs' motion, Judge Smith empaneled an advisory jury and conducted the trial of plaintiffs' remaining FTCA claims against the United States from June 19 through July 14, 2000. The advisory jury found that the United States had not acted negligently in any respect.

Plaintiffs filed a Second Motion to Recuse on September 12, 2000, while the case was under submission. Judge Smith issued a judgment rejecting plaintiffs' FTCA claims in their entirety on September 20; he amended it one week later. In addition to findings of fact and conclusions of law, the revised opinion contained Judge Smith's rationale for denying plaintiffs' Second Motion to Recuse. *Andrade v. United States*, 116 F. Supp. 2d 778 (W.D. Tex. 2000). The plaintiffs timely appealed to this court.

Before proceeding, we note that there are two sets of appellants. The group represented by Ramsey Clark and Lawrence W. Shilling (the "Brown Appellants") had its claims dismissed by Judge Smith's July 1999 Memorandum Opinion and Order. *Andrade v. Chojnacki*, 65 F. Supp. 2d 431 (W.D. Tex. 1999). Judge Smith partially reinstated these claims on April 21, 2000. The other group is represented by Michael A. Caddell, Cynthia B. Chapman, and James Juranek (the "Andrade Appellants").

STANDARD OF REVIEW

This court reviews denials of motions to recuse for abuse of discretion. *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999). The judge abuses his discretion in denying recusal where "a reasonable man, cognizant of the relevant

circumstances surrounding [the] judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality." *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999). Requests for recusal raised for the first time on appeal are generally rejected as untimely. *United States v. Sanford*, 157 F.3d 987, 988-89 (5th Cir. 1998).

Conclusions of law are reviewed *de novo*, *Hart v. Bayer Corp.*, 199 F.3d 239, 243 (5th Cir. 2000), and evidentiary and discovery-related rulings for abuse of discretion, *Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000).

DISCUSSION

I. Judicial Recusal

A. General Principles

Under 28 U.S.C. § 455 (2000), a party may request the recusal of a judge not only if "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," *id.* § 455(b)(1), but also when "his impartiality might reasonably be questioned," *id.* § 455(a). These provisions afford separate, though overlapping, grounds for recusal. Subsection (b)(1) pertains to specific instances of conflicts of interest, while subsection (a) deals with the appearance of partiality generally. Further, whenever a judge's partiality might reasonably be questioned, recusal is required under § 455(a), irrespective whether the circumstance is covered by § 455(b). *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n.8, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

Caselaw has articulated several interpretative guidelines for this statute. One of the relevant maxims is that the

standard for bias is not "subjective," as it once was, but, rather, "objective." *See Vieux Carre Prop. Owners, Residents & Assocs. v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1992). Courts moved to this less deferential standard in response to Congress's 1974 revisions to the 1948 statute, and it is with reference to the "well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person" that the objective standard is currently established. *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995).

Another maxim is that review should entail a careful consideration of context, that is, the entire course of judicial proceedings, rather than isolated incidents. *Sao Paulo State of the Federative Rep. of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232-33, 122 S. Ct. 1290, 1292, 152 L. Ed. 2d 346 (2002); *United States v. Avilez-Reyes*, 160 F.3d 258, 259 (5th Cir. 1998).

Finally, the origin of a judge's alleged bias is of critical importance. In 1994, the Supreme Court applied a common-law doctrine commonly called the "extrajudicial source rule" to the interpretation of § 455. *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). As articulated by the Supreme Court, this rule more or less[1] divides events occurring or opinions expressed in the course of judicial proceedings from those that take place outside of

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[1] The Court's opinion observes that the "extrajudicial source doctrine" and its exceptions are designed to isolate instances where a judge exhibits "wrongful" or "inappropriate" bias or prejudice and such instances will most often, though not always, arise from knowledge gained or relationships existing outside formal proceedings before the judge. *Liteky*, 510 U.S. at 540.

the litigation context and holds that the former rarely require recusal:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."

Id. at 555 (internal citations and footnotes omitted).

Appellants sought Judge Smith's recusal under § 455(a) and (b)(1). Their success depends upon their ability to clear the foregoing hurdles. They must (1) demonstrate that the alleged comment, action, or circumstance was of "extrajudicial" origin, (2) place the offending event into the context of the entire trial, and (3) do so by an "objective"

observer's standard. Moreover, they must demonstrate that the district court's refusal to recuse was not merely erroneous, but, rather, an abuse of discretion. It is hardly surprising that they failed to clear them.

B. Extrajudicial Bias

The Andrade Appellants specify fifteen events which, they argue, constitute their case for recusal. By Appellants' own admission, eight of these are intrajudicial," thus requiring a more deferential review than that applicable to the seven of "extrajudicial" origin. We turn first to the extrajudicial events.[2]

1. Events and Circumstances Beyond Judge Smith's Control

Two of the seven "extrajudicial" events – both beyond Judge Smith's control – may be dismissed without exhaustive consideration. One is trivial, the second moot.

The Andrade Appellants complain that over the course of the trial, government counsel occasionally gave T-shirts, food, beverages, cookies, and candies to employees in the federal clerk's, marshal's, and court reporter's offices. In ruling upon the recusal motion, Judge Smith found that the T-shirts were part of "a prank played on a deputy marshal," and none of the recipients were "members of the Court's staff." While Appellants maintain that the receipt of these gifts

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[2] The government argues that several of the latter seven events ought more appropriately be characterized as having occurred during the judicial proceedings. The government may well be correct in regard to some of the incidents, but for simplicity, we accept Appellants' characterization.

created an "appearance of impropriety," they do not challenge the accuracy of Judge Smith's findings. We accept the uncontested findings of the district court, and fail to see how these small courtesies to the court's non-judicial staff could be viewed by any "objective" observer as compromising Judge Smith's independence.

The other allegation is that Judge Smith's longstanding relationships with two of the dismissed defendants, William Sessions and William Johnston, gave rise, at the very least, to the "appearance of impropriety." As an Assistant U.S. Attorney for the Western District of Texas, Johnston made frequent appearances before Judge Smith. Sessions, formerly the Director of the FBI, had served on the federal district court for the Western District of Texas from 1974-87; Judge Smith served with Sessions from 1983-87 while Sessions was Chief Judge. This issue is moot, as both Sessions and Johnston were dismissed from the case in July 1999. In any event, no facts are proven to suggest that either prior relationship evinces characteristics that would even suggest, much less mandate recusal. *See Parrish v. Bd. of Comm'rs.*, 524 F.2d 98, 104 (5th Cir. 1975).

2. Comments Made By Judge Smith

The five other extrajudicial events can be divided into three categories: (a) the judge's alleged *in camera* statements to trial counsel, (b) his public comments regarding government attorneys Johnston and James Touhey, and (c) his alleged *ex parte* comments to reporter Lee Hancock.

a. Judge Smith's Alleged *in camera* Comments

Judge Smith's alleged *in camera* statements, though said to violate §§ 455(a) and (b)(1), are unproblematic. On June

22, 2000, Appellants prepared to offer into evidence documents showing the FBI's failure to develop adequate plans to extinguish fire at the compound. These documents had been the subject of extensive pretrial wrangling. When Judge Smith announced his decision not to allow admission, the Andrade Appellants' counsel approached the bench and requested an *in camera* conference. During the conference, Judge Smith said that he had not read Appellants' proffered evidence. Somewhat later, as the litigants discussed the empaneling of an advisory jury, Judge Smith told Mr. Caddell that, "if you don't think I've got the guts to disregard the [advisory] jury's verdict, you're wrong." Appellants argue that these two statements contribute to their case for recusal.

Judge Smith's declaration that he had not read the evidence prior to denying its admissibility is of no legal import. Appellants offered the evidence to advance the proposition that the FBI could have – in fact, should have – planned for the possibility of fire. Such an argument is almost surely barred from consideration, however, by the discretionary function exception to the FTCA. 28 U.S.C. § 2680 (a) (2000). Although the FTCA permits, in general, suits against the United States, it exempts the government from liability for "acts that are discretionary in nature," those "involving an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)). Judge Smith had no need to examine the evidence supporting this claim, because the applicability of the discretionary function exception does not turn on evidence of the actual decisions made by the defendants, but, rather, on whether the decision is or is not "susceptible to policy analysis". *Id.* at 325; *see also Baldassaro v. United States*, 64 F.3d 206, 209 (5th Cir. 1995). In light of the law on this point, Judge Smith's

preference not to read the evidence – and his declaration – cannot constitute evidence of bias or even the appearance of such.

This being said, Appellants were not without options. They might have appealed Judge Smith's decision to exclude this evidence and sought direct review of the applicability of the discretionary function exception. But they did not do so. Issues not raised on appeal are waived. *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1099 (5th Cir. 1991).

Equally unavailing is Appellants' allegation that Judge Smith's statement regarding his willingness to disregard the advisory jury's verdict manifests an impermissible judicial bias. The FTCA does not grant plaintiffs the right to a jury trial. 28 U.S.C. § 2402 (2000). Notwithstanding the clear congressional mandate that claims against the federal government are to be tried to the bench, Appellants moved for the empaneling of an advisory jury; over the government's objection, Judge Smith honored the request. But he was under no obligation to accept its verdict. *Sullivan v. Rowan Cos.*, 952 F.2d 141, 147 (5th Cir. 1992). His statement accurately, if bluntly, reflected the status of the advisory jury verdict. Even if Appellants found this in-chambers statement offensive, their claims are to be judged by an objective standard. The statement is neither "grossly inappropriate" nor "patently offensive," as required by our precedent. *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165-67 (5th Cir. 1997).

b. Judge Smith's Public Comments

Appellants also point out Judge Smith's comments regarding William Johnston and his compliment toward James Touhey to advance their case for recusal. We reject the arguments.

As mentioned above, Johnston was one of the original defendants to this lawsuit. While the case was before the district court, a Special Counsel from within the Justice Department investigated Johnston for allegedly withholding evidence from defendant Davidians during their criminal trial. According to a newspaper report, Judge Smith was upset by the investigators' treatment of Johnston (the article used the term "witch hunt" to describe Judge Smith's view). In response, Judge Smith told several investigators in September 2000 that he would no longer cooperate with the inquiry and that he would not permit the investigators to carry firearms into the courthouse. The Special Counsel subsequently visited Judge Smith in his chambers to repair the rift. The judge's comments, however, are irrelevant to Appellants' case for recusal, as Johnston had been dismissed from this case in July 1999 – 15 months before this incident occurred.

Appellants argue that Judge Smith's public compliment of James Touhey, a government attorney, supports mandatory recusal under §§ 455(a) and (b)(1). According to Appellants, Touhey conducted a "particularly vicious cross-examination of Davidian witness Clive Doyle," in which Doyle was "reduced to tears." During the subsequent recess and outside the presence of the jury, Appellants' counsel observed Judge Smith enter the courtroom, pat Touhey on the back, shake his hand, and congratulate him, saying "Good job, Mr. Touhey!"

Appellants acknowledge that a judge's "compliments in the course of legal proceedings should not ordinarily support a partiality challenge," *Certain Underwriters at Lloyds London v. Oryx Energy Co.*, 944 F. Supp. 566, 568 (S.D. Tex. 1996), but they view the relationship reflected here between Touhey and Smith as exceptional. Doyle had been charged with murder, tried before Judge Smith, and acquitted by the jury in the Davidians' criminal trial. With his

compliment, Appellants argue, Judge Smith conveyed his gratitude to Touhey for Doyle's belated humiliation.

Appellants' argument fails for two reasons. First, not only does their brief omit citing the most prominent Supreme Court statement on point, *Liteky*, 510 U.S. at 555 ("judicial remarks that are critical or disapproving of, or even hostile to, counsel for the parties or their cases, ordinarily do not support a bias or partiality challenge"), but they also neglect to discuss two relevant Fifth Circuit cases cited by the government. See *United States v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997) (affirming denial of motion to recuse where district judge allowed "the Government more leeway during its questioning and did interrupt defense counsel's questioning more often than the Government's questioning"); *Garcia v. Woman's Hosp. of Texas*, 143 F.3d 227, 230 (5th Cir. 1998) (affirming denial of motion to recuse where district judge had made unflattering comments about plaintiff's ability to prove her case). Second, in attributing to Judge Smith's compliment something more than "just a compliment," Appellants overlook that it is with reference to the "well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person" that inappropriate or wrongful bias is established. *Jordan*, 49 F.3d at 156. This court sees a compliment, not a subliminal message of wrongful bias. Accordingly, we find no grounds for recusal here.

c. Judge Smith's Alleged *ex parte* Comments

On September 13, 2000, one week before Judge Smith issued his initial findings of fact and judgment denying Appellants' FTCA claims and two weeks before he ruled upon Appellants' Second Motion for Recusal, the *Dallas Morning News* published a story reporting Appellants' filing

of their second recusal motion. The article quotes attorney Caddell, describes his view of Judge Smith as biased, states that Caddell changed his earlier-expressed decision not to appeal because of the bias, and paraphrases at length the allegations in the recusal motion. Before assessing the likelihood that the motion would succeed, the article briefly speculates on the outcome of the case, based upon several of Judge Smith's alleged comments. The passage, in its entirety, reads as follows:

> FINAL RULING
>
> Judge Smith has offered some indications that his final ruling will mirror the jury's decision.
>
> Late in the four-week trial, he told a reporter that sect members broke the law by resisting the federal search and by refusing to surrender during the 51-day siege. He said those violations probably trumped plaintiffs' arguments that government agents acted negligently in efforts to end the standoff.
>
> The judge noted he might be in "one hell" of a position with his decision to impanel an advisory jury for the type of civil case normally decided by a judge alone.
>
> During the civil trial, the judge sometimes reacted emotionally to graphic evidence. After spending a weekend reviewing the government's excerpts from surveillance recordings made in the compound during the siege, he remarked during a break in the case that the tapes would "blow" the plaintiffs "out of the pond."

Lee Hancock, *Davidians' Attorney Vents Anger at Judge; Appeal Now Planned in Wrongful Death Suit*, Dallas Morning News, Sept. 13, 2002, at 25A.

Appellants contend that Judge Smith's alleged *ex parte* comments violated Canons 2(A), 3A(4) and 3A(6) of the Code of Judicial Conduct.[3] Conceding that violations of the Code do not necessarily give rise to a violation of § 455(a), they nevertheless argue that courts consistently "take a hard line for those involving judicial commentary on pending cases." Three cases exemplify their position that reviewing courts have set a standard for unacceptable judicial misbehavior and mandatory recusal that readily encompasses Judge Smith's comments. *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001); *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330, 253 F.3d 34, 114 (D.C. Cir. 2001); *United States v. Cooley*, 1 F.3d 985, 988 (10th Cir. 1993). These are serious charges, but because Appellants never brought this article to the district court's attention, their fulminations lack record support and context. We cannot review this claim.

Two full weeks passed between publication of the article and Judge Smith's final ruling on Appellants' motions for reconsideration and recusal, but Appellants never moved to supplement their motion. Nonetheless, they included a copy of the article in their Record Excerpts submitted to this court, in violation of Fed. R. App. P. 10(e)(2)(C). *See United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. Nov. 1981). We retain discretion to grant Appellants' motion to supplement the record in this court,[4] but exercising that option raises another procedural hurdle, because untimely motions to

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[3] Code of Conduct for United States Judges, 175 F.R.D. 363, 365-367 (1997).

[4] *Pegues v. Morehouse Parish Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983); *but cf. United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995).

recuse are ordinarily rejected. *Sanford*, 157 F.3d at 989. This aspect of Appellants' recusal claim is untimely, as *Sanford* holds, because it was raised only after an adverse judgment and for the first time on appeal.[5]

Cognizant of such problems, Appellants seek to compare their situation with that of Microsoft and its district judge, who repeatedly spoke with reporters concerning the merits of the case on the condition that the conversations be "embargoed" until the court released its decision. *Microsoft Corp.*, 253 F.3d at 108. Because Microsoft had not learned of the court's ventures until opportunity for objection had passed, the Court of Appeals permitted Microsoft to raise the recusal issue on appeal and does not appear to have subjected it to a more stringent standard of review. *Id.*

Any comparison with *Microsoft* is wholly unpersuasive. There is no evidence that if Judge Smith gave an interview, he enforced silence on the *Dallas Morning News* reporter. On the contrary, his comments were published, it appears, shortly

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[5] *Sanford* notes that this court has declined to craft a per se rule concerning untimeliness of recusal motions, but generally, such motions must be filed "at the earliest moment" after a movant receives knowledge of the facts suggesting disqualification. 157 F.3d at 988, (quoting *Travelers Ins. Co. v. Liljeberg Enters.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). *Sanford* also notes this court's reluctance to employ a plain error standard of review to untimely recusal motions. *Id.* at 989; *see United States v. Gray*, 105 F.3d 956, 968 (5th Cir. 1997) (plain error review utilized "for the sake of argument"); *United States v. York*, 888 F.2d 1050, 1056 (5th Cir. 1989). The remainder of the above discussion makes clear that even if we employed plain error "for the sake of argument," Appellants' contentions regarding the newspaper article are meritless.

after they were made and sufficiently before the district court's final ruling. Even more obvious is that Appellants' counsel *had* given an interview to the reporter to highlight the filing of his second motion to recuse. Mr. Caddell is prominently and directly quoted in the article. It is near impossible to believe that notwithstanding his willingness to publicize the filing of the second motion to recuse, on the eve of the court's expected ruling on the merits, Appellants' counsel did not even bother to check whether the reporter (who covered the case throughout trial) had written an article. The *Dallas Morning News* enjoys an excellent reputation and is read statewide; the paper had been diligently covering the trial; the article was at least constructively available before Judge Smith ruled. These circumstances distinguish the instant case from *Microsoft*.

Appellants' argument ultimately asks this court to judge the judge based exclusively on the fact of publication of his remarks, without context and without verification of their accuracy. It is hardly clear whether Judge Smith actually gave an interview or spoke off the cuff, and whether his comments were made in chambers or on the bench, *ex parte* or to a group of listeners, yet Appellants have jumped to the conclusion that he violated the judicial Code of Conduct in several ways by giving an interview. But there is no way of knowing what generated the article, and it represents multilevel hearsay. These circumstances emphasize the wisdom behind the procedural rules - limiting supplementation of the appellate record; deeming waiver or forfeiture of issues not raised in the trial court; and restricting the scope of appellate review - that are designed to confine appellate review to factfinding that occurs in the trial court. Because Appellants' complaint about the newspaper article was not properly preserved for appellate review, we deny the motion

to supplement the record with this article and reject this point of error.

C. Intrajudicial Bias

Notwithstanding the obstacle that *Liteky* presents to recusal claims based upon a judge's expression of beliefs arising from intrajudicial sources, Appellants press eight events that occurred on the record during judicial proceedings and which, they argue, support the case for recusal.

These events are, in chronological order, as follows:

1. When issuing his sentencing findings in the criminal prosecution of some Davidians, Judge Smith declared that the defendants and other adult Davidians "ambushed" and "conspired to cause the death of" federal agents on February 28, 1993. Appellants argue that these findings, made with respect to convictions that were affirmed on appeal,[6] demonstrate his deep-seated antagonism toward the Davidians.

2. Judge Smith acquired over the course of the criminal proceedings a firm conviction that it was the Davidians who set fire to the living quarters at Mount Carmel on April 19, 1993, a belief he carried over to other cases tried before him, *e.g. Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996), and to the case at bar. (Appellants did not, however, appeal his finding to that effect after this trial.)

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[6] *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999); *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996).

3. Judge Smith's comments in *Risenhoover* – that the Davidians were "soft as clay" and "easily manipulated," that their leader was a "false prophet" whose teachings focused on paramilitary training," and that their beliefs are "fanaticism . . . difficult for most people to understand" – made fair judgment impossible.

4. On June 27, 2000, when Appellants attempted to introduce the deposition testimony of Livingstone Fagan, Judge Smith referred – in an off-the-record bench conference – to Fagan, a resident of Mount Carmel who had previously been criminally tried and acquitted by Judge Smith, as a "crazy, murdering son-of-a-bitch"; he subsequently issued an inept apology.[7]

5. On July 13, when Appellants attempted to introduce expert-prepared transcripts of the government's surveillance tapes, Judge Smith referred to these transcripts – in an off-the-record bench conference – as "bullcrap"; he subsequently admitted them.

6. Judge Smith presented the respective transcripts of the surveillance tapes to the jury in unfair manner: Appellants' transcripts were described as the work of Appellants' attorneys, whereas the government's transcripts were presented as the product of professional expertise. This characterization was especially galling to Appellants, as Judge Smith had previously allowed the government's "expert" to

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[7] "That statement was off the record and in response to another lawyer's humorous suggestion, and was not in any way intended to be taken seriously. The Court regrets the slight to Mr. Fagan's Mother, should he have one." The judge forgot that Doris Fagan burned to death in the fire at Mount Carmel on April 19, 1993; her estate is a plaintiff in these proceedings.

produce his transcripts after the court-ordered deadline, stating that compliance was not important, as his work was non-expert.

7. On July 14, in charging the advisory jury, he allegedly gave an improper standard for determining liability, refused Appellants' submitted instruction, and failed to include any instructions regarding liability for foreseeable acts of third parties. That this inadequacy was intentional, Appellants allege, can be seen by comparing these instructions with the precision of his charge in *Risenhoover*, a case in which government agents injured or killed in the February 23, 1993 conflict brought suit against a reporter, certain media organizations, and an ambulance company that had alerted the Davidians, in violation of Texas law, to the impending assault.

8. On April 4, 2002, Judge Smith refused to certify Appellants' Statement of Proceedings, a document attempting to introduce into the record (pursuant to Fed. R. App. P. 10(c)) several of Judge Smith's unrecorded comments during the trial. Appellants had submitted this memorialization in February 2002, over a year and a half after the alleged statements were made. They contend that Judge Smith's refusal to certify demonstrates his bias, as the government did not dispute the substance of the document.

The first six of these events represent the expression of "opinions formed . . . on the basis of facts . . . or events occurring in the course of the current proceedings, or of prior proceedings," and are the type of opinions/expressions that *Liteky* holds nearly exempt from causing recusal. Appellants contend that *Liteky* either does not apply or should not apply as rigorously when, as in this FTCA case, the judge is the factfinder. There is no support for this position legally or

logically. Judges often find facts in performing their duties - in admitting evidence, in sentencing criminals, in ruling on motions, as well as in deciding bench-tried cases. *Liteky* draws no distinction based on the type of proceeding, and none is warranted.

The last two events are embodied in judicial actions that Appellants could have, but did not, appeal. Since one of these involves the irrelevant advisory jury and one a grievously late attempt to create a factual record for appeal, to allow the judge's demeanor or actions in the two events a significant influence on our recusal decision would be grossly disproportionate to the legal implications of his actions.

Appellants rightly contend, however, that apart from its broad statement, *Liteky* acknowledges that rarely, events in court may "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." 510 U.S. at 555. Among the events cited above, only one - Judge Smith's ill-tempered references to Fagan - even arguably fall within that deplorable range. And those brief comments in the course of a decade of litigation refer only to one witness, not to the Davidians or Appellants in general or to the merits of their case. Moreover, *Liteky* states that "expressions of impatience, dissatisfaction, annoyance and even anger" do not establish bias or partiality. *Liteky*, 510 U.S. at 555-56.

II. Other Issues

A. The Andrade Appellants

The Andrade Appellants' opening brief raises only one issue: whether Judge Smith abused his discretion in denying their motion for recusal. Responding to the government's emphasis on their limited appellate gambit, Appellants offered in their reply brief a four-page account of eleven alleged trial errors, asserting that many more could be documented. Additionally, they argue that allegations of bias effectively relieve them of the obligation to charge error, presenting only one case, *Maurino v. Johnson*, 210 F.3d 638, 645 (6th Cir. 2000)("judicial bias infects the entire trial process"), in support of this proposition.

The Andrade Appellants are skillfully represented by experienced counsel who surely knew that in this court, briefing issues for the first time in a reply brief is not allowed. *Lockett v. EPA*, 319 F.3d 678, 690 n.51 (5th Cir. 2003). Neither thoughtlessly nor coincidentally did they attempt to show trial errors in such a way that, even if non-cognizable, the mere allegations could influence this court while depriving the government of an opportunity to respond. We must infer from these tactics that Appellants concluded there were no colorable appellate issues concerning Judge Smith's rulings, as opposed to his alleged bias.

That Appellants apparently reached this conclusion is a testament, however unintended, to the judge's overall capability. Real judicial bias, it is true, "infects the entire judicial process," *Maurino*, 210 F.3d at 645, but a harmless error standard of review applies nevertheless. *See In re Continental Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990). Appellants' argument for reversal is misplaced.

B. The Brown Appellants

Notwithstanding the Brown Appellants' lengthy brief, we cannot discern an argument in law for the reversal of the district court's judgment. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994)("A party who inadequately briefs an issue is considered to have abandoned the claim."). Although the Magna Carta and Geneva Convention are venerated documents, citation of such sources without more does not suffice to demonstrate judicial error. We admire the sincerity of the Brown Appellants' presentation but they offer no tangible ground for reversal of the judgment.

CONCLUSION

For the foregoing reasons, we find no basis for recusal of Judge Smith nor any other reversible error. The district court's judgment in favor of Appellees is accordingly **AFFIRMED**.

Appellants' Motion to Supplement Record **DENIED** as to the newspaper article dated September 13, 2000; **GRANTED** as to the other items.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-96-CA-139 (Consolidated)

[Filed September 27, 2000]

ISABEL G. ANDRADE, ET AL.,	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant.	)
	)

AMENDED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above-captioned cause of action came on for trial before the Court and an advisory jury on June 19 through July 14, 2000.

Before reaching the merits of the suit, the Court must address two motions recently filed by the Plaintiffs – a second motion to recuse and a motion for reconsideration. The attorneys for the Andrade plaintiffs request the undersigned recuse himself from further participation in this lawsuit because they contend there was bias against them and their

clients. This motion is a further example of this attorney's abuse of the judicial process. As has been clear that for the past year, the attorneys representing the Andrade plaintiffs have attempted to try their case in the media through the use of innuendo, distortions, and outright falsehoods, rather than honestly presenting the true facts of the case. None of the allegations contained in Plaintiffs' motion, either singularly or combined, forms a legal basis for recusal.

Although it should not be necessary, the Court reminds Mr. Caddell of a lawyer's responsibilities as set out in the Preamble to the Texas Disciplinary Rules of Professional Conduct:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

Rule 8.02(a) further provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office." Many of the allegations contained in Plaintiffs' motion are either false or made with reckless disregard as to their truth or falsity.

As an example, Mr. Caddell asserts that the Court should recuse himself because the Government's attorneys presented gifts to the Court's staff. Having investigated, the Court has determined that as a prank played on a deputy marshal, some t-shirts were purchased by government attorneys and presented to deputy marshals. Deputy marshals are not part of the Court's staff. Neither the undersigned, nor his secretary, court reporter, or his law clerks (those persons who constitute the Court's staff) received t-shirts, nor were even aware until now that the prank had occurred. Other "gifts" that Mr. Caddell may refer to involve the presentation of chocolate chip cookies to the clerk's office, baked by a representative of the government. Once again, the employees of the clerk's office are not members of the Court's staff, and neither the undersigned, his secretary nor law clerks received any cookies.

As a second example, Mr. Caddell complains of the Court's comments concerning Livingstone Fagan. That statement was *off the record* in response to another lawyer's humorous suggestion, and was not in any way intended to be taken seriously.

Additionally, there is absolutely no legal basis for Plaintiffs' motion, but is merely another attempt to unnecessarily complicate this litigation. Accordingly, the Andrade Plaintiffs' Second Motion to Recuse is **DENIED**.

The Brown and Holub Plaintiffs seek reconsideration of this Court's decision to proceed to rule on the FLIR issue without an additional hearing. This decision was made as the Plaintiffs had no desire to go to London to depose the Court's expert or to appear before this Court to cross-examine him. Despite Plaintiffs' assertions, they have been on notice since the Court's Order of June 13, 2000 that the Court would

resolve this issue on the pleadings and summary judgment proof that had already been filed and on the report from Vector Data Systems. The parties have had more than sufficient time since that date to present additional evidence or argument regarding the FLIR issue. The failure to present such evidence is the fault of the parties in attempting to circumvent the clear intention of the Court that Mr. Oxlee's deposition occur in England rather than in the United States. Had the parties adhered to the Court's Order, Mr. Oxlee's deposition could have been taken and presented to the Court by this time.

The Court understands the financial straits that the Plaintiffs and their attorneys may face, but that is no more than is faced by any plaintiff in any civil suit. The fact that a party cannot afford to hire a particular expert or take as many depositions as they wish is merely a product of our legal system – there is no requirement that a defendant or the Court be forced to absorb such expenses merely because a plaintiff may wish it. In no other case has the Court required a defendant to defray as many pre-trial costs as in this one. There will be no further delay for the Plaintiffs to present any additional FLIR evidence.

The Brown and Holub Plaintiffs additionally object to being required to pay their proportionate share of the FLIR test that was conducted at Ft. Hood. The amount attributable to these Plaintiffs is a mere drop in the bucket to the total costs that were expended to hold the test and to transport the Lynx helicopter from Great Britain. There was no objection from any party at the time the protocol was finalized in St. Louis, even though all parties were represented; nor was there any objection made to the Court's Order mandating the FLIR test which clearly provided that the costs of the tests would be assessed among the parties as the Court deemed

appropriate. Accordingly, the Motion of the Brown and Holub Plaintiffs for Reconsideration of the Court's Order of August 29, 2000 is **DENIED**.

The Andrade Plaintiffs' latest attempt to delay this case is their Motion to Reopen the evidence. As with their Motion to Recuse, there is no basis for their request. Plaintiffs argue that they were prepared to present evidence regarding the Government's misconduct during the 51-day siege but did not because of the Government's stipulation that it would not seek an issue regarding contributory negligence. However, that evidence would not have been admissible regardless of the Government's stipulation. Plaintiffs obviously did not read the Court's previous Order partially granting the Government's and individual Defendants' Motions to Dismiss and/or for Summary Judgment which determined that there could be no liability for the Government's actions during the 51-day siege because those actions were covered by the discretionary function exception to the Federal Tort Claims Act. Additionally, the charge given to the jury was absolutely correct – Plaintiffs were under an obligation to submit to lawful authority and were in violation of the law for their failure to do so. Finally, the Plaintiffs' actions during that time preclude them from claiming negligence on the part of the Government as their own actions were the sole proximate cause of any injuries during that period. The law requires each person to act reasonably; the standard is what a reasonable person would do, not what a reasonable Davidian would do. As a matter of law, there was nothing reasonable about the adult Davidians' behavior from February 28, 1993 through April 19, 1993. Accordingly, Plaintiffs' Motion to Reopen is **DENIED**.

The next issue the Court must address is the Plaintiffs' allegation that FBI agents fired into the Compound on April

19, 1993 to prevent the Davidians from exiting. As the Court previously noted, there is sufficient summary judgment proof contained in the record in this case, along with the report from Vector Data Systems, to rule upon this issue without the necessity for a hearing, although the Court did provide the opportunity for the parties to address these issues in a hearing. The basis for Plaintiffs' argument in this regard is the presence of flashes or glints of light that could be seen on the FLIR tape taken on April 19. The Court has carefully considered all of the expert testimony filed by both sides, as well as that of VDS, and has determined that Plaintiffs have failed to establish that any of those "anomalies" are gunfire. This is bolstered by the following: (1) the glints are too long in light of the signature flashes of the fastest weapons possessed by the FBI on that day; and (2) there is no detectable human presence in the vicinity of the glints. Plaintiffs' experts offer mere speculation that FBI agents could have been there and might have been wearing clothing that would not have been detected by the FLIR. Mere speculation does not constitute proof, and there is no further proof in support of those claims. Accordingly, it is **ORDERED** that the Government is entitled to Judgment as a matter of law on the FLIR issue.

After considering the pleadings, evidence, arguments and briefs, the Court enters the following findings of fact and conclusions of law:

Findings of Fact

A. Background

The background of the Davidians and the ATF investigation is set forth in the Court's July 1, 1999

Memorandum Opinion and Order and is incorporated herein. Therefore, the Court will not revisit those issues.[1]

B. The Events of February 28, 1993

1. The Branch Davidians (Davidians) initiated a gun battle when they fired at federal officers who were attempting to serve lawful warrants.

2. The Davidians provoked gunfire when they barraged ATF agents with gunfire directed from multiple locations.

3. The gunfire came from all floors of the Mt. Carmel Compound (Compound).

4. No ATF agent fired any shot nor used any force against residents of the Compound and the Davidians that was unprovoked.

5. Gunfire was directed at ATF agents by both male and female adult Davidians.

6. No ATF agent fired any shot nor used any force against residents of the Compound and the Davidians that was indiscriminate.

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[1] The only factual issues that Plaintiffs have proven incorrect from the Court's Order were the presence of Army personnel at the scene and the use of pyrotechnic devices by the FBI. However, the Army personnel had no participation in any of the events that occurred on April 19, but acted merely as observers. Also, the pyrotechnic devices fired by the FBI did not penetrate the Compound and did not cause nor contribute to the fire.

7. ATF agents returned gunfire to the Compound in order to protect themselves and other agents from death or serious bodily injury.

8. At all times, the ATF agents' gunfire was directed at those areas of the Compound where they perceived deadly threats.

9. The ATF agents were prevented from serving the lawfully issued arrest and search warrants by the Davidians' superior fire power and defensive position.

C. The Events of April 19, 1993

1. A number of Davidians left the Compound after February 28 but before April 19, 1993.

When the FBI injected tear gas into the Compound on April 19, 1993, the remaining Davidians did not leave as instructed by the FBI. Instead certain Davidians directed gunfire at the CEV's and the Bradley vehicles.

2. The FBI acted with restraint on April 19, 1993, despite the deadly gunfire directed at them during the tear gas operation. The FBI did not return fire.

3. During the course of the day, certain Davidians prevented others from leaving the Compound. During the stand-off, Davidians had blocked the doors, windows, and other areas of the Compound, thereby inhibiting egress from these areas on April 19, 1993. At least twenty-one of the Plaintiffs died of wounds that apparently were either self-inflicted or inflicted by other Davidians; twenty Davidians died of gunshot wounds and one child died of a stab wound to the chest.

4. The FBI did not prevent nor hinder any Plaintiff from leaving the building. To the contrary, the FBI repeatedly asked the Davidians to leave the building, warned them that tear gas would be inserted, opened up egress routes, and cleared material that was blocking the front door.

5. The Davidians possessed large-caliber weapons and had used these weapons to kill and injure the ATF agents. Military vehicles were utilized to provide protection to the officers on the scene.

6. FBI agents operating the military vehicles inserted tear gas in accordance with the approved Plan of Operations on April 19, 1993. Because the plan could not provide for every contingency, it necessarily afforded discretion to the FBI agents on the scene to adapt to the evolving conditions, including, among other things, the failure of the Davidians to leave the building, the relative ineffectiveness of the tear gas due to the wind and the Davidians' gas masks, and the possibility that certain individuals inside were prevented from leaving because the exits were barricaded. Any deviation from the written plan was within the authority delegated to the agents on the scene.

7. One of the military vehicles, CEV-1, penetrated the left-front area of the compound with its boom only to insert tear gas. CEV-1 did not cause any debris to fall on nor block the trap-door located some twelve feet from the front of the building.

8. Although the FBI fired three so-called "military" CS tear gas rounds at approximately 8:00 a.m. on April 19, 1993 at the structure the Plaintiffs call the tornado shelter, no such rounds were fired into the main wooden structure. No Plaintiff was injured by the firing of these rounds, and they

had no causal relationship to the fires which broke out shortly after noon.

9. Three separate fires started within two minutes of one another, beginning shortly after noon on April 19, 1993.

10. These fires were started intentionally by Davidians, including but not limited to, Plaintiffs David Koresh,[2] Clive Doyle, Pablo Cohen and Derek Lovelock.[3]

11. The aduit Davidians kept the children in the Compound after starting the fire rather than sending them to safety.[4]

12. The fires were neither caused nor contributed to by any act of the Defendant.

13. In fact, several of the Davidians were rescued by FBI agents, who faced gunfire and flames to pull them to safety. Special Agents Bryan Timmis and Mark Tilton left the protection of their Bradley Vehicles to come to the aid of Plaintiff Marjorie Thomas, who was on fire when she left the building. Special Agent James McGee actually entered the building when it was engulfed in flames and carried Ruth

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[2] The entire tragedy at Mount Carmel can be laid at the feet of this one individual.

[3] The most telling evidence in this regard is the conversations of the Davidians captured by the FBI on the hidden microphones. While there was much discussion of spreading the fuel and starting the fire, there was no discussion of getting the children to safety.

[4] In contrast, agents of the Defendant acted reasonably in their efforts to protect the children.

Riddle to safety. Neither would tell the agents where the children were located, nor would Clive Doyle after he left the building.[5]

14. The FBI's plan to combat a fire at the Compound, should any develop, did not violate any mandatory directive from the United States Attorney General. The FBI's plan relied on the firefighting resources of the local community. In accordance with the FBI's plan, the local authorities were contacted shortly after the fire started.

15. Generally, in order to rescue fire victims, firefighters must enter the structure and fight the fire from the inside. However, because gunfire continued to be heard in the Compound even as the fire consumed the building, the fire trucks were held away from the Compound temporarily, and the firefighters were not permitted to enter. In addition to gunfire, explosions from propane tanks and grenades increased the potential danger to the fire fighters.

16. The United States Attorney General did not mandate that the FBI have armored fire trucks or other equipment available on scene. In fact, she was aware that civilian firefighters would not be permitted to approach the Compound while the Davidians were shooting.

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[5] The actions of these agents are the most telling evidence that the Government did not plan to Intentionally harm the Davidians either by shooting them or by setting fire to the Compound. It is inconceivable that these agents were the only ones not part of the "conspiracy." Likewise, had the Government intended to burn the Davidians out, the FBI would have used a true incendiary device rather than the ferret rounds actually used.

17. There is no proof that armored fire fighting vehicles that were available would have been effective due to their limited water reservoirs, the lack of a water supply at the scene, and the extreme speed in which the Compound was engulfed in flames.

18. The only gunfire on April 19, 1993 was generated by certain Davidians inside the Compound. There was no gunfire from any employee of the United States that day. None of the surviving Davidians saw or heard gunfire from any FBI agents, members of the military, or any person other than the Davidians at Mt. Carmel on April 19, 1993. Certain of the events that morning were recorded by the FBI's airborne forward looking infrared (FLIR) camera. Although the FLIR tapes do not show any people outside the Compound before the fire, the system did record a number of flashes in the area around the compound during the late morning. These flashes are too long in duration to have been caused by gunfire.

19. The Andrade and Holub Plaintiffs have stipulated that the following weaponry and ammunition were found in the Compound following the April 19, 1993 fire:

Sixty one (61) AK-47 rifles;

Sixty-one (61) M-16 rifles;

Thirty-four (34) semi-automatic AR-15 rifles;

Three (3) Galil rifles;

Eleven (11) FN-FAL Belgian rifles;

Ten (10) Ruger Mini-14 semi-automatic rifles;

Five (5) M-14 rifles;

Two (2) .50 caliber rifles;

Two (2) SP-89 firearms;

Five (5) MAC-11/9 firearms;

Thirteen (13) shotguns

Six (6) .30 caliber carbines;

Over fifty (50) pistols and revolvers;

A British semi-automatic Sten gun;

Other assorted rifles;

Forty-eight (48) of the firearms found in the Compound had been modified to shoot in a fully automatic mode;

Barrels for AR-15 or M-16 rifles; one barrel for a M-60 machine gun; and four (4) barrels for other firearms;

A number of illegal silencers and several silencer components; Hundreds of cartridge magazines and magazine springs for various firearms; Hundreds of thousands of rounds of ammunition, some cooked off; Several hundred rounds of spent ammunition;

A number of grenade rockets, rocket heads and a wide variety of gun parts; One live hand grenade;

Hundreds of pieces of exploded pineapple-type hand grenade fragments;

Hundreds of pineapple-type hand grenade hulls and several baseball-type hand grenade hulls, and seven (7) flare launchers.

20. Any finding of fact which would more appropriately be a conclusion of law is deemed so.

Conclusions of Law

1. Jurisdiction is vested in this Court by virtue of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 2671, *et seq.* (FTCA). The FTCA is a limited waiver of sovereign immunity for claims sounding in tort. Plaintiffs contend venue was proper in the Southern District of Texas, Houston Division, where Plaintiffs' claims were initially filed, but do not challenge venue at this point in the Waco Division of the Western District of Texas.

2. Under the FTCA, Texas law governs this case.

3. Under the FTCA, Texas negligence law governs this case.

4. As a matter of Texas law, the Government was negligent if one of its agents, a) failed to do what a person of ordinary prudence would have done under the same or similar circumstances; or b) did what a person of ordinary prudence would not have done under the same or similar circumstances.

5. As a matter of Texas law, the Government's agents must exercise that degree of care that an ordinary prudent

person would have used under the same or similar circumstances.

6. As a matter of Texas law, although the duty owed to children by the Government's agents is generally the same as that owed to adults, the risk of injury to a child may be greater than that posed to an adult by the same condition or act. Therefore, the exercise of ordinary care toward a child may require different conduct than would be required toward an adult.

7. As a matter of Texas law, a child under five years of age cannot be negligent.

8. As a matter of Texas law, a child at least five years old and under fourteen years old was negligent only if that child, a) failed to do what an ordinary prudent child of the same age, experience, intelligence and capacity would have done under the same or similar circumstances; or b) did what such a child would not have done under the same or similar circumstances.

9. As a matter of Texas law, a child at least five years old and under fourteen years old must exercise only that degree of care that an ordinary prudent child of the same age, experience, intelligence and capacity would have used under the same or similar circumstances.

10. As a matter of Texas law, a person who is fourteen years old or older is negligent only if that person, a) failed to do what a person of ordinary prudence would have done under the same or similar circumstances; or b) did what a person of ordinary prudence would not have done under the same or similar circumstances.

11. As a matter of Texas law, a person who is fourteen years old or older must exercise that degree of care that an ordinary prudent person would have used under the same or similar circumstances.

12. As a matter of Texas law, the negligence of a parent will not be imputed to a child with respect to a cause of action by the child's estate for survivor damages.

13. As a matter of Texas law, only the negligence of a parent that was a proximate cause of the death of the child will be considered in allocating responsibility with respect to the parent's wrongful death cause of action.

14. As a matter of Texas law, proximate cause means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person other than the defendant or the particular claimant (deceased or injured party) was the "sole proximate cause" of an event, then no act or omission of any other person could have been a proximate cause.

A. The Events of February 28, 1993

1. It is the law of the case that the United States cannot be held liable for any claims based upon the decision to use a "dynamic raid and entry" to serve the warrants because these claims are barred by the discretionary function exception to the waiver of sovereign immunity. Likewise is the decision

not to attempt to arrest David Koresh away from the Compound.

2. Moreover, ATF's decision to use a "dynamic raid and entry" to serve the warrants was reasonable under the circumstances in light of the accumulation of weapons by the Davidians.

3. The ATF agents complied with the law, including identifying themselves and their purpose at the outset, in attempting to execute the arrest and search warrants at the Compound.

4. Because ATF agents did not fire without provocation or in an indiscriminate manner, the use of force by ATF agents was reasonable under the circumstances and cannot result in liability.

5. A law enforcement officer is privileged to engage in certain conduct which could normally be considered tortuous because the officer "has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the Plaintiff. The Defendant is allowed freedom of action because his own interest, or those of the public, required it, and because social policy will best be served by permitting it. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1231 (5th Cir. 1988) (quoting W. Keeton, Prosser and Keeton on Torts, 16 (5th edition 1984)). As stated in *Hinojosa*, a police officer in Texas is also privileged even to use force when necessary in the performance of his duties as an officer. *Id.*, citing the Texas Penal Code Annotated, §§ 9.21-9.22, 9.51, 9.52. Further, an officer in the state of Texas has an affirmative duty to execute all lawful process issued to him by any Magistrate or Court. Texas Code of Criminal Procedure, Annotated, Article 2.13.

B. The Events of April 19, 1993

1. It is the law of the case that the United States cannot be held liable for any claims based upon the decision to use tear gas in the April 19, 1993 attempt to end the stand-off because these claims are barred by the discretionary function exception.

2. Likewise, the decision to use tanks to insert the tear gas is protected by the discretionary function exception. The FBI had discretion as to the type of vehicles and equipment to use in attempting to achieve the goals of the operation which were grounded in law enforcement policy. Given that the discretion to use tear gas is protected, the decision as to the type of vehicles and equipment to use in insertion is necessarily protected as well. *See United States v, Faneca*, 332 F.2d 872, 874-75 (5th Cir. 1964), *cert. denied*, 380 U.S. 971, 85 S. Ct. 1327, 14 L. Ed. 2d 268 (1965) (barring claims based on the decision to use tear gas, the "*modus operandi* and the time to put it into action").

3. Therefore, Plaintiffs' claim alleging that the FBI was negligent in proceeding with the tear gas operation in light of the information available regarding the condition of the building, the habits of the Davidians, and the weather is also barred by the discretionary nature of the conduct at issue. The exception covers negligence and abuse of discretion, as well as the failure to consider possible alternatives. *Myslakowski v. United States*, 806 F.2d 94, 97-98 (6th Cir. 1986), *cert, denied*, 480 U.S. 948, 107 S. Ct. 1608, 94 L. Ed. 2d 793 (1987)("Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical matters in discretionary decision-making that [§ 2680(a)] exists.") Thus, even assuming that the decision to proceed with the operation failed to consider the

possibility that the Davidians might start a fire--and thus "could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached," *id.*-the discretionary function exception bars the claim. *See Red Lake Band of Chippewa Indians v. United States*, 255 U.S. App. D.C. 162, 800 F.2d 1187 (D.C. Cir.1987) (barring claims based on failure to assess information received and to have alternative plan in place).

4. Similarly, Plaintiffs' claim that the use of military tanks to insert tear gas caused the Davidians to refuse to surrender and to set the building on fire, killing their children and themselves, is barred because this claim is "based upon" and arises out of conduct that is encompassed by the discretionary function exception. *See* 28 U.S.C. § 2680(a) (barring any claim "based upon" the exercise or performance of a discretionary function); *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279 (3rd Cir.) (en banc), *cert. denied, Balmaceda, Inc. v. United States*, 516 U.S. 806, 116 S. Ct. 49, 133 L. Ed. 2d 15 (1995) (barring claim deemed "based upon" discretionary decision to suspend importation of fruit, notwithstanding plaintiffs' contention that claim is predicated on negligent chemical analysis underlying the decision).

5. Further, the Court finds as a matter of law that the use of tear gas, an accepted law enforcement practice, was reasonable under the circumstances, given the refusal of the Davidians to comply with lawful orders to surrender. Texas has accorded privileges to its law enforcement officers in the performance of their duties as officers. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1231 (5th Cir. 1988), *cert. denied*, 493 U.S. 822, 110 S. Ct. 80, 107 L. Ed. 2d 46 (1989) (privilege protects actor from finding of tortuous conduct). Under the FTCA, the United States may invoke privileges available to state law enforcement officials. *Id. See*

also, Louie v. United States, 776 F.2d 819, 824-25 (9th Cir. 1985). The use of tanks to insert tear gas to end the 51-day stand-off between federal officers and armed resisters was privileged under Texas law which allows officers to use that force necessary to make or assist in making an arrest or search. *See* Texas Penal Code § 9.51.

6. Moreover, even if the United States was negligent in causing damage to the building prior to the start of the fire, such negligence was not the proximate cause of the Plaintiffs' injuries. The intervening criminal acts of certain Davidians in starting the fire was a superceding cause that was different in kind from that which would otherwise have resulted from such negligence. It therefore broke any purported causal connection between the damage to the building and the Plaintiffs' injuries. *See Skipper v. United States*, 1 F.3d 349, 353 (5th Cir. 1993) (murder committed by intoxicated boyfriend was superceding cause which extinguished any liability on the part of club that served alcohol to him because premeditated murder was not "of such a general character as might reasonably have been anticipated" by the club); *Phan Son Van v. Pena*, 990 S.W.2d 751 (Tex. 1999) (gang members' criminal conduct and harm inflicted was extraordinary in nature and not of the type generally contemplated by unlawfully furnishing alcoholic beverages to minors and thus was superceding cause of injuries and death).

7. Because the fire was started by certain Davidians, the United States owed no duty to protect the remaining Davidians from the fire and no special relationship existed between the Plaintiffs and the United States which would invoke such a duty. *See Crider v. United States*, 885 F.2d 294, 299 (5th Cir. 1989), *cert. denied*, 495 U.S. 956, 110 S. Ct. 2561, 109 L. Ed. 2d 743 (1990) ("it presses the potential liability of law enforcement officers-or of any group-to the

extreme to suggest that just because having a contact with a potentially dangerous actor they become responsible for his conduct"). Despite this, a number of FBI agents risked their lives to assist Davidians from the burning Compound and to attempt to save the children.

8. Because the fire was started by certain Davidians, the United States owed no duty to rescue the remaining Davidians from a peril it did not cause. *See Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 127 (Tex. Civ. App.-Galveston 1944).

9. The FBI's decision not to allow the fire trucks upon the property was reasonable. The on-scene commander would not allow the fire trucks to approach the Compound given the risk of injury or death posed to firefighters by the gunshots coming from the Compound. His decision not to allow the fire trucks to approach the Compound until it was safe for them to do so was reasonable under the circumstances and therefore cannot result in liability.

10. Plaintiffs' related claim based on the failure to have specialized equipment that may have enabled firefighters to approach the compound sooner despite the gunfire is barred by the discretionary function exception. The decisions as to the type of equipment to be utilized fall within the exception because they are "susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). *See Brown v. United States*, 790 F.2d 199, 203 (1st Cir. 1986), *cert. denied*, 479 U.S. 1058, 107 S. Ct. 938, 93 L. Ed. 2d 989 (1987) (barring claim that death of fisherman was caused by failure to obtain more or better equipment because "[all of these are matters which Congress reserved, both to itself in respect to appropriations, and to the agencies' conduct by the discretionary function exception]").

11. Any conclusions of law which should more appropriately be a finding of fact is deemed so.

SIGNED this 27th day of September, 2000.

/s/_____

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

Civil No. W-96-CA-139 and consolidated with: W-96-CA-140 W-96-CA-141 W-96-CA-142 W-96-CA-143 W-96-CA-144 W-96-CA- 145 W-96-CA- 146 W-96-CA-147

[Filed February 18, 1997]

ISABEL G. ANDRADE, et al.,
Plaintiffs,

v.

PHILLIP J. CHOJNACKI, et al.,
Defendants.

ORDER

This action arises out of the tragic events resulting from the failed raid by officers of the Bureau of Alcohol, Tobacco and Firearms ("ATF") on the Branch Davidian complex at Mt. Carmel ("Mr. Carmel") in the early spring of 1993. Plaintiffs consist of Branch Davidians who were injured in the initial raid or subsequent fire, or their surviving family members. Defendants are the United States and various governmental entities and employees involved in the initial

raid, the subsequent standoff and final assault. Plaintiffs initiated the instant civil suits in the Southern District of Texas, Houston Division. Upon motion by Defendants, the cases were transferred to this Division. Plaintiffs have filed a number of pre-trial motions, including a motion to recuse the undersigned, who presided over the criminal trial of various Branch Davidians ("the criminal trial") and separate civil litigation brought by wounded agents of the ATF against various media organizations and representatives who were present at Mt. Carmel on the day of the raid ("the *Risenhoover* litigation"). Having reviewed Plaintiffs' motions and Defendants' responses, the following disposition will be made:

I. MOTION TO INTERVENE

Initially, the Court notes that Plaintiffs have filed motions to intervene in the *Risenhoover* litigation in order to discover information that was filed under seal as an exhibit to the media Defendants' motion to recuse. The undersigned has fully examined the pertinent sealed document and is persuaded that the information contained therein is unrelated to the present motion to recuse. The document at issue includes no statements or opinions regarding the Branch Davidians. Accordingly, Plaintiffs' Motion to Intervene in *Risenhoover* to Modify Protective Order; Motion to Compel Production of Discovery and Motion for Injunction is **DENIED**.[1] As no party has presented any reason why the pertinent document should remain sealed, it is **ORDERED** that the Clerk's Office

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[1] An identical motion was filed in the ATF litigation, Civil Action No. W-93-CA-138 styled *John T. Risenhoover, et al. v. Cox Texas Publications, Inc., et al.* It is likewise **DENIED**.

attach as an exhibit to this Order, Exhibit 1 to the Cox Defendants' Sealed Motion for Relief, Memorandum of Interview dated June 13, 1995, which was filed in Civil Action No. W-93-CA-138 (consolidated). The remainder of the Cox Defendants' motion will remain sealed.

II. MOTIONS FOR DISCOVERY AND PROTECTION

The parties have filed numerous motions regarding discovery as it relates to the *Risenhoover* litigation. As the parties to that suit have settled, these motions are now moot. Accordingly, it is **ORDERED** that the Individual Federal Defendants' Motion for a Protective Order is **GRANTED** and the Plaintiffs' Motion for Discovery Before ATF Agents' Depositions Begin is **DENIED**. The Court will, however, order the Government not to dispose of any documents or information produced during discovery in the *Risenhoover* litigation, and the current stay on discovery will remain in effect.

III. RECUSAL

Plaintiffs assert that recusal is appropriate in this case under 28 U.S.C. §§ 144, 455(a) and 455(b)(1) for basically three reasons: (1) rulings and comments made during the criminal trial and related litigation demonstrate that the undersigned is biased and prejudiced against the Branch Davidians and Plaintiffs; (2) the undersigned's knowledge of local events and professional acquaintance with two Defendants create the appearance of bias; and (3) comments critical of the undersigned by groups and individuals sympathetic to the Branch Davidians "create reasonable questions about whether Plaintiffs' [sic] can get a fair trial

before a judge so attacked by their supporters.[2] Plaintiffs' Motion to Transfer to San Antonio Division or, Alternatively, to Recuse Judge Walter S. Smith, Jr. ("*Andrade* Motion"), p. 30; Plaintiffs' Motion for Recusal and Transfer to San Antonio ("*Brown* Motion"). The facts upon which Plaintiffs rely consist of the following:

1. The undersigned has a "history of loyalty and service to the community and its institutions, government agencies and personnel," and has "worked extensively with many of the government officials who participated in various ways in events leading up to this tragedy, the tragedy itself and its aftermath. . . ." Brown Motion, pp. 4 and 5.

2. The appeal of the criminal convictions is pending. Brown Motion, p. 5; Andrade Motion, p. 27.

3. A ruling has already been made by the undersigned adverse to the Gyarfas plaintiffs. Brown Motion, p. 5.

4. The undersigned has never recognized that Plaintiffs were exercising their religion at Mt. Carmel, nor "shown anything but contempt, or worse, for the Church, its members, or its children," referring to the Mt. Carmel center

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[2] Plaintiffs have additionally included some unsupported allegation that the undersigned was investigated by the Department of Justice on charges of perjury in an unrelated matter. As the undersigned has no knowledge of this investigation, it could not constitute the basis for any bias or prejudice.

as a "compound," and referring to its inhabitants as a "cult" and "Davidians." Brown Motion, pp. 5-6, 10.

5. At the sentencing of the related criminal defendants, the undersigned referred to events during the initial raid and subsequent fire in terms that exhibited more compassion for the four dead ATF agents than the deceased residents of Mt. Carmel. Brown Motion, p. 7.

6. Also at sentencing, the undersigned referred to several facts established during the trial, including the following: (a) except for a handful of individuals, the remaining Davidians committed suicide or were killed by other Davidians; (b) the religious ideology of the Branch Davidians included the belief that they would be involved in a violent conflict with federal agents and they stockpiled weapons and ammunition to prepare for this conflict; (c) the first shots on the day of the raid were fired from inside the Mt. Carmel complex. Brown Motion, pp. 7-8.

7. The undersigned reinstated the convictions of the criminal defendants on charges of using a firearm during the commission of a crime of violence after initially ruling that the convictions should be set aside as the defendants were acquitted of conspiring and aiding and abetting in the murder of federal agents. Brown Motion, p. 8.

8. In an opinion in the Risenhoover case, and in the criminal trial, the undersigned referred to incidents regarding the Branch Davidians before and during the raid, and concluded that the fire at Mt. Carmel was set by the Branch Davidians. Brown Motion, p. 9; Andrade Motion, p. 34.

9. The undersigned has "ties" to Defendants William Sessions and William Johnston. Andrade Motion, p. 14.

10. The undersigned was criticized by some members of the media and various authors and publications regarding rulings made during the criminal trial. Brown Motion, p. 6, Andrade Motion, pp. 29-30.

A motion for recusal is within the discretion of the trial judge, and will be reversed only if the judge has abused that discretion. *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (citations omitted). A motion for recusal falls within two types: (1) a motion alleging actual bias upon the part of a judge, which is filed under 28 U.S.C. § 144; and (2) a motion alleging the appearance of impropriety, which is filed under 28 U.S.C. § 455. A motion under § 144 must meet certain procedural requirements, such as the following: (1) a party must file a "timely and sufficient affidavit" setting out the alleged personal bias or prejudice; and (2) the affidavit must be legally sufficient. 28 U.S.C. § 144; *United States v. Miranne*, 688 F.2d 980, 985 (5th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983) (citations omitted). Although the judge for whom recusal is sought may not pass upon the truth of the matters alleged in a § 144 affidavit, he must review them to determine

whether they meet the standard of "legal sufficiency." *Henderson v. Dept. of Public Safety & Corrections*, 901 F.2d 1288 (5th Cir. 1990). To be "legally sufficient", the affidavit must meet the following test:

> (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature.

Merkt, 794 F.2d at 960, n.9 (citations omitted); *Henderson*, 901 F.2d at 1296. *See also Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). If the affidavit meets the above criteria, then "the factual allegations must be taken as true for purposes of recusal." *Merkt*, 794 F.2d at 960.

Under the provisions of § 455(a), a judge shall disqualify himself

> "in any proceeding in which his impartiality might reasonably be questioned." A judge shall also disqualify himself under certain circumstances enumerated under § 455(b), including "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Henderson, 901 F.2d at 1295. The courts have noted that the purpose of § 455(a) is "to avoid even the appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988), *quoting* the lower Court opinion at 796 F.2d 796, 802 (5th Cir. 1986).

> If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. . . . Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Id. If a judge concludes that "'his impartiality might reasonably be questioned,' then he should also find that the statute has been violated." *Id.*

Under either § 144 or § 455, the movant must establish that any claimed bias arises from an "extra-judicial" source, and must "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Phillips*, 664 F.2d 971, 1002 (5th Cir. Unit B 1981), *cert. denied sub nom., Meinster v. United States*, 457 U.S. 1136 (1982), *quoting United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). "Thus, a motion for recusal may not ordinarily be predicated upon the judge's rulings in the same or a related case." *Id.* at 1002-1003. The mere fact that a judge has ruled adversely to a litigant is insufficient to support a claim of recusal. *United States v. Schoenhoff*, 919 F.2d 936 (5th Cir. 1990).

A judge must also be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of an anticipated adverse decision.

In re Kansas Public Employees Retirement System, 85 F.3d 1353, 1358-59 (8th Cir. 1996), citing Legislative history to § 455, S.Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973).

> Disqualification for lack of impartiality must have a reasonable basis. Nothing in [§ 455(a)] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Id. See also United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992). The allegations and innuendoes raised by Plaintiffs in this case persuade the undersigned that Plaintiffs' request for recusal actually is an attempt to avoid a ruling on Defendants' motions to dismiss and for summary judgment because motions raising similar issues were, for the most part, decided counter to Plaintiffs' interests by the undersigned in the companion case of *Gyarfas v. United States. et al.*, Civil Action No. W-95-CA-022. Even if this is not true, the allegations raised by Plaintiffs in the instant action are insufficient to justify recusal under §§ 144, 455(a) or 455(b).

A. Comments and Prior Court Rulings. The great majority of Plaintiffs' allegations of "bias" and "prejudice" arise from statements and rulings made by the undersigned in the criminal trial and in the *Risenhoover* litigation. The courts have repeatedly held that information obtained during the course of litigation cannot, generally, be a basis for recusal. *See United States v. Mizell*, 88 F.3d 288 (5th Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 620 (1996).

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J.P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 1155 (1994). Opinions formed on the basis of facts introduced or events occurring during the course of a proceeding, or a prior proceeding, may, however, constitute a basis for recusal if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 1157. The comments identified by Plaintiffs in this case were based upon the undisputed testimony introduced at the criminal trial and in the summary judgment exhibits in the *Risenhoover* case. In neither case was there a concerted effort made to contest the facts which now concern Plaintiffs; namely, that the Branch Davidians fired first, that the Branch Davidians started the fire that consumed Mt. Carmel, and that the teachings of

David Koresh were "para-military" in nature. The defendants in the criminal trial did not testify and did not, therefore, present actual "evidence" to support the assertions raised solely by their attorneys and widely reported in the media as "fact." Additionally, the statements Plaintiffs contest from the *Risenhoover* case were based upon the pleadings, the uncontroverted summary judgment proof, and the Waco Tribune-Herald's series *The Sinful Messiah*, which was included as an exhibit. There is, therefore, no "actual" bias or prejudice identified, nor is there anything presented which could lead a reasonable person in full possession of the pertinent facts to conclude that any bias or prejudice is present merely from the comments and rulings identified by Plaintiffs. Clearly, if the issues raised by Plaintiffs in this case are supported by evidence that was not introduced at either the criminal trial or in the *Risenhoover* case, it will be weighed and evaluated as any other evidence.

B. Pending Appeal. Plaintiffs next argue that the pending appeal in the criminal case warrants recusal due to the possibility of the undersigned being reversed by the Fifth Circuit Court of Appeals. As previously noted, the courts have held that it is "normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky*, 114 S.Ct. at 1155. Therefore, the specter of reversal does not, in itself, justify recusal. To allay Plaintiffs' fears, it should be noted that the Fifth Circuit has affirmed the convictions of the criminal defendants in *United States v. Brad Eugene Branch, et al.*, 91 F.3d 699 (5th Cir. 1996). Mandate was held pending en banc review of the constitutionality of 28 U.S.C. § 922(o) in a separate case, as it related to the convictions of Paul Fatta on two counts. However, the Fifth Circuit has now upheld the constitutionality of that statute. *See United States v. Kirk*, ____ F.3d ____, 1997 WL 40602 (5th Cir., Feb. 3, 1997) (en

banc). The defendants' sentences on Count Three (using or possessing a firearm during the commission of a violent felony), however, were remanded for reconsideration in light of the opinion in *Bailey v. United States*, ____ U.S. ____, 116 S.Ct. 501 (1995). Therefore, except for this one issue, which is only tangentially related to the issues in the present case, the undersigned's rulings and findings in the criminal case were upheld. Accordingly, there is no basis for recusal because of the pending appeal.

C. Acquaintance with Defendants Sessions and Johnston. Generally, a friendship between a presiding judge and a person with an interest in a case is, in and of itself, insufficient to justify recusal. *See United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995); *Vieux Carre Property Owners v. Brown*, 948 F.2d 1436 (5th Cir. 1991); *Henderson v. Dept. of Public Safety*, 901 F.2d 1288 (5th Cir. 1990). Plaintiffs believe recusal is justified because of the undersigned's "relationship" with two Defendants: (1) William Sessions ("Sessions"), who was director of the Federal Bureau of Investigation ("FBI") during the events at issue; and (2) Assistant United States

The only allegation regarding a relationship with Johnston is that he appears regularly before the undersigned. There apparently is no case law that mandates recusal in such a situation. The relationship with Sessions is not any closer. While the undersigned and Sessions worked for the same firm, it was at different times. The undersigned worked for the Haley, Fulbright firm from 1978-1980. By 1978, Sessions had been appointed to serve as a United States District Judge in the El Paso Division. Prior to his appointment to the federal bench in 1974, the Texas Legal Directory reflects that Sessions served as the United States Attorney for the Western District of Texas in San Antonio from 1971-74. Prior to that,

he was employed with the Department of Justice in Washington, D.C. from 1969 to 1971. Sessions served as Chief Judge of the Western District of Texas in San Antonio from 1980 until his appointment as Director of the FBI in 1987. The undersigned became a colleague of Sessions' only after appointment as a United States Magistrate in the Waco Division in 1983, and appointment as the United States District Judge for the Waco Division in 1984. The mere fact that a judge was a colleague of an individual with an interest in a case before him does not form a basis for recusal. *See United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985), *cert. denied*, 474 U.S. 908 and *cert. denied*, 474 U.S. 1034 (1985) (recusal not required even though presiding judge had been a colleague of assassinated judge for eight to nine years, was an honorary pallbearer at the funeral, eulogized him at memorial ceremonies, and was placed under 24-hour guard for over a year after assassination, as there was no special social relationship between the judges or their families). A similar past relationship was held not sufficient to justify recusal in *United States v. Lovaglia*, 954 F.2d 811 (2d Cir. 1992). In that case the presiding judge's former law firm represented a victim of the criminal activity of a defendant appearing before the judge. The judge had also been involved in a business and social relationship with a shareholder in one of the victim construction companies. However, there had been no business or social relationship between with this individual in seven to eight years. *See also Vieux Carre Property Owners v. Brown*, 948 F.2d 1436 (5th Cir. 1991); *Henderson v. Dept. of Public Safety & Corrections*, 901 F.2d 1288 (5th Cir. 1990).

The situation in *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995) is far different from the circumstances of this case. In *Jordan*, a panel of the Fifth Circuit determined that recusal was required under § 455(a) because the judge was a close

personal friend of an individual who had been accused of criminal misconduct by the defendant appearing before her. Additionally, the judge's husband and been law partners with the individual for six years and represented the individual in the criminal case brought by the defendant. Finally, the judge and her husband were law school classmates with the individual and his wife, and had been close friends for 22 years. Obviously, this is a far cry from the limited relationship identified by Plaintiffs. As the Fifth Circuit has noted:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend -- even a close friend -- [is involved].

Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1411 n. 13 (5th Cir. 1994), *citing United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Accordingly, recusal is not warranted based upon any relationship between the undersigned and either Johnston or Sessions.

D. Criticism by Supporters and the Media. Plaintiffs finally argue that a number of Branch Davidian supporters

and authors have criticized the undersigned for various rulings and the conduct of the criminal trial. In a free society, public comment is, of course, to be unfettered and unrestrained. However, we cannot allow negative criticism to hamstring the operations of the judiciary. If that were so, recusal would be mandated in every high profile case, where there may be as many opinions as spectators. Accordingly, Plaintiffs' allegations in this regard are also insufficient to justify recusal. In light of the foregoing, it is **ORDERED** that the Motions to Recuse filed by the Plaintiffs are **DENIED**.

IV. MOTIONS TO TRANSFER VENUE

Plaintiffs alternatively argue that even if recusal is not forthcoming, the trial of this case should be held in some division other than Waco, preferably in San Antonio. The undersigned is persuaded that these motions are premature. When the case is closer to trial, Plaintiffs may then renew their motions. Accordingly, Plaintiffs' Motions to Transfer Venue to San Antonio are **DENIED**.

V. OTHER PENDING MOTIONS

Defendants have filed motions to dismiss and motions for summary judgment. In order to expeditiously resolve these motions, it is **ORDERED** that any additional briefing or summary judgment proof shall be submitted to the Court by March 3, 1997. No additional briefs or exhibits will be considered, except in the most extraordinary circumstances and only with leave of Court. As to the remaining motions, it is

ORDERED that the following motions are **GRANTED**: (1) Plaintiffs' Motion for Leave to File a Sur-reply, filed on April 12, 1996; (2) Motion by the United States to File a

Memorandum of Law Which Exceeds the Page Limit in Support of its Motion to Dismiss and for Summary Judgment, filed on April 15, 1996; (3) Motion by Robert Rodriguez to Join Individual Federal Defendants' Motion for a Protective Order, filed on May 30, 1996; (4) Motion by Holub Plaintiffs for Leave to File a Response to the United States' Motion to Dismiss and for Summary Judgment Which Exceeds the Page Limit, filed on May 30, 1996; (5) Motion by Plaintiffs for Leave of Court to Supplement the Record With Corrected Exhibit Numbers and Incorporated Memorandum in Response to the United States' Motions to Dismiss and for Summary Judgment, filed on June 3, 1996; and (6) Motion by Plaintiffs to Clarify Plaintiffs' Motion to Transfer to San Antonio Division or, Alternatively, to Recuse, filed on June 5, 1996. It is further

ORDERED that the Motion of the United States to Strike the Declaration of Brad Branch or, in the Alternative, for Leave to File an Additional Memorandum of Law, filed on April 25, 1996, and Supplement to the Motion filed on April 26, 1996, are partially **GRANTED** in that the United States is granted leave to file an additional memorandum of law. It is further

ORDERED that Defendants' Objection to Plaintiffs' Filing of Extraneous Pleadings or, in the Alternative, Motion for Leave to Respond, filed on December 24, 1996, is partially **GRANTED** in that the United States is granted leave to file a response. It is further

ORDERED that Defendants' Motion for Enlargement of Time to Respond to Plaintiffs' Motions to Transfer or, Alternatively, to Recuse, filed on June 7, 1996 is **DENIED** as moot, as the Court has considered their response filed on June 28, 1996. It is further

ORDERED that Plaintiffs' Motion for Reconsideration of Defendants' Motion for Leave to File Supplemental Briefs, filed on August 30, 1996 is **DENIED**. It is further

ORDERED that Plaintiffs' Unopposed Motion for Enlargement to Respond to the United States' Motion for Leave to Exceed Page Limit and to Preserve Issues for Later Briefing and Argument (filed in W-96-CA-139 and W-96-CA-373) is **GRANTED** and Plaintiffs shall file their response on or before February 20, 1997. Plaintiffs' Agreed Motion to Extend Deadline, filed on January 14, 1997, and Unopposed Motion for Enlargement of Time, filed on January 22, 1997, are **DENIED** as moot. It is further

ORDERED that Defendants' Unopposed Motion for Enlargement of Time filed on January 21, 1997 is **GRANTED** and Defendants shall have until February 20, 1997 to file their response to Plaintiffs' motion for leave to file supplemental briefs and amended motion for leave to amend their consolidated complaint.

SIGNED this 18th day of February, 1997.

/s/_____
WALTER S. SMITH, JR.
United States District Judge

EXHIBIT 1

WACO ADMINISTRATIVE REVIEW

MEMORANDUM OF INTERVIEW Date: June 13, 1995

File Title: ISMITHW.HGM
Witness: Walter S. Smith
Title: Judge
Date of Interview: June 30, 1993
Interviewer: H. Geoffrey Moulton, Jr.

THIS REPORT IS THE PROPERTY OF THE DEPARTMENT OF THE TREASURY, WACO ADMINISTRATIVE REVIEW. NEITHER IT NOR ITS CONTENTS MAY BE DISSEMINATED OUTSIDE THE TREASURY DEPARTMENT

Witness: Judge Walter S. Smith, Jr.

Date of interview or action: June 30, 1993

Report prepared by: E. GEOFFREY MOULTON, JR.

Contact Address: United States District Waco, Texas

Contact Phone Number:

1. On Wednesday, 06/30/93, I spoke by telephone with Judge Walter S. Smith, Jr., United States District Judge in Waco, Texas. Smith was returning my call of the day before. When I asked Judge Smith about setting up an interview in Waco, he responded that he could tell me in five minutes, over the telephone, all he knew about the raid on the Davidian Compound before its execution.

Because Judge Smith clearly preferred to be interviewed at the time on the telephone, I proceeded with the interview.

2. Judge Smith stated that he first learned about ATF's plan to serve the warrants in question on Friday, 02/26/93, at about 3:00PM. At that time AUSA John Phinizy, who had been in Smith' s courtroom for another purpose, asked to come to chambers to speak with the Judge. Phinizy explained that AUSA Bill Johnston had asked him to tell the Judge, for security reasons, that ATF planned to serve search and arrest warrants at the compound on Sunday morning. Phinizy stated that the Waco Tribune-Herald was planning to write a story about Koresh and the Branch Davidian, that ATF had therefore contacted the paper and asked it to delay publication until after the raid, and that the paper had been holding off. Phinizy then said that at the last minute the paper had said it was going to publish the story on Sunday. Phinizy explained that ATF planned to go out Sunday morning, buy up the newspapers and try to execute the warrants anyway.

3. On Saturday morning, 02/27/93, AUSA Bill Johnston Called Judge Smith to express his frustration over the fact that the Tribune-Herald had published the first installment of their "Sinful Messiah" series that morning. Johnston said he did not know whether the action would go forward, and told the Judge there would be a meeting late on Saturday to decide. Judge Smith told me that he spoke with no one other than Phinizy and Johnston about the raid until the afternoon of 02/28/93.

4. At about 12:30PM on 02/28/93, Judge Smith was having Sunday dinner at home with his brother. After his brother expressed concern about something he had seen in the

Tribune-Herald (unrelated to Koresh et al.), Judge Smith said "if you think that's bad," and proceeded to relate the essence of what he had heard from AUSAs Phinizy and Johnston. Judge Smith continued by saying to his brother that he hoped no one was injured, and that if there were injuries he would lay responsibility at the door of the newspaper. Five minutes later, Judge Smith received a phone call from a friend who said he should turn on the TV. When he did so, Judge Smith saw that the raid had gone forward and gone bad.

5. Judge Smith stated that he had no other pre-raid knowledge either about the raid or about how the media and Koresh learned of the raid.

APPENDIX E

Recusal:

Analysis of Case Law Under
28 U.S.C. §§ 455 & 144

Federal Judicial Center
2002

This publication was undertaken in furtherance of the Federal Judicial Center's statutory mission to develop and conduct education programs for judicial branch employees. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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Preface

Litigants often move for trial judges to recuse themselves on grounds of partiality or the appearance of partiality. Improper denial of motions seeking recusal may have serious consequences. First, it can deprive citizens of their right to a "neutral and detached judge."[3] Second, it can diminish public trust in the judicial system, which requires confidence in the impartiality of judges.

This monograph offers a synthesis and analysis of the case law under 28 U.S.C. §§ 455 and 144 to assist judges in ruling on recusal. It identifies the core principles and recurring issues in the voluminous case law, and it examines how the courts of appeals have applied these principles. The monograph does not propose reforms or critique court decisions. Judges should, of course, review the applicable decisions in their own circuits, as cases may exist in addition to the representative cases discussed here.

This monograph does not discuss the requirements of the Code of Conduct for United States Judges or the opinions on recusal issued by the Codes of Conduct Committee of the Judicial Conference of the United States.[4] Decisions rendered under the recusal statutes sometimes differ from advice provided by the committee under Canon 3C of the Code of Conduct. Also, recusal problems other than those covered by the statutes may be raised by the Code of Conduct.

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[3] Ward v. Village of Monroeville, 409 U.S. 57 (1972).

[4] The D.C. Circuit has stated that "[t]he Code of Conduct is the law with respect to the ethical obligations of federal judges." United States v. Microsoft Corp., 253 F.3d 34, 113 (D.C. Cir. 2001).

Consequently, judges should consult the committee's opinions for advice on how to proceed under the Code. The Code of Conduct, Published Advisory Opinions, and a Compendium of Selected Opinions of the Committee may be found in Volume II, Chapters 1, 4, and 5, respectively, of the *Guide to Judiciary Policies and Procedures.*

This monograph was prepared by Alan Hirsch, Esq., and Kay Loveland, of the Federal Judicial Center, with substantial editorial assistance from Kris Markarian, also a Center staff member. The Federal Judicial Center acknowledges the contribution of the Codes of Conduct Committee of the Judicial Conference of the United States and staff members of the Office of the Associate Director and General Counsel of the Administrative Office of the U.S. Courts.

[p. 59]

II. Recusal in Bench Trials

The question arises whether the standard for recusal differs in a bench trial, where the judge's role is even more pivotal than in a jury trial. In *Alexander v. Primerica Holdings, Inc.*[275] the court of appeals noted the following: "We cannot overlook the fact that this is a non-jury case, and that [the judge] will be deciding each and every substantive issue at trial."[276] "When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced."[277]

Price Brothers v. Philadelphia Gear Corp.[278] involved an alleged ex parte communication. The Sixth Circuit held that "*where a suit is to be tried without a jury,* sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a presiding judge" that a remand was necessary to determine the truth of the allegation.[279]

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[275] 10 F.3d 155 (3d Cir. 1993).

[276] *Id.* at 163.

[277] *Id.* at 166.

[278] 629 F.2d 444 (discussed *supra* text accompanying note 174).

[279] *Id.* at 446 (emphasis added). On remand, the Sixth Circuit found harmless error. Price Bros. v. Philadelphia Gear Corp., 649 F.2d 416 (6th Cir. 1981).

It does not follow, of course, that recusal is unnecessary in jury trials. As the Third Circuit said in a different case: "[S]ection 455 properly makes no distinction between jury and nonjury trials. The district judge in a jury trial must still make numerous pretrial rulings, including crucial summary judgment rulings, and will doubtless be called on to make numerous rulings on the qualification of witnesses and on evidentiary matters, not to mention post-trial motions."[280]

The D.C. Circuit Court of Appeals stated that "recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided," but "section 455(a) does not require it."[281]

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[280] *In re* School Asbestos Litig., 977 F.2d 764, 782 (3d Cir. 1992).

[281] United States v. Barrett, 111 F.3d 947, 951 (D.C. Cir. 1997). *See also* United States v. Parker, 742 F.2d 127, 128-29 (4th Cir. 1984) (recusal not required in same circumstance).